Bering Sea tribunal of arbitration

FUR SEAL ARBITRATION.

PROCEEDINGS

OF THE

TRIBUNAL OF ARBITRATION,

CONVENED AT PARIS

UNDER THE

TREATY BETWEEN THE UNITED STATES OF AMERICA AND GREAT BRITAIN CONCLUDED AT WASHINGTON FEBRUARY 20, 1892,

FOR THE

DETERMINATION OF QUESTIONS BETWEEN THE TWO GOVERNMENTS CONCERNING THE JURISDICTIONAL RIGHTS OF THE UNITED STATES

IN THE

WATERS OF BERING SEA.

VOLUME XI.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1895.

FUR-SEAL ARBITRATION.

ORAL ARGUMENTS

ON

THE MOTION OF THE BRITISH GOVERNMENT

FOR THE

PRODUCTION BY THE UNITED STATES OF THE REPORT OF HENRY W. ELLIOTT,

AND ON

THE MOTION OF THE UNITED STATES

FOR THE

REJECTION OF THE SUPPLEMENTARY REPORT OF THE BRITISH COMMISSIONERS.

SESSION OF THE TRIBUNAL OF ARBITRATION.

SECOND DAY, APRIL 4TH, 1893.

The PRESIDENT.—The Tribunal has decided to appoint Mr. A. Bailly-Blanchard, and Mr. Cunynghame, as co-Secretaries with Mr. A. Imbert. Also, M. le chevalier Bajnotti, M. Henri Feer, M. le vicomte de Manneville, as assistant Secretaries and these gentlemen are, therefore, to take their seats.

Now, gentlemen, I address both the Agents and I may say that the Tribunal is ready to hear any motion from either of you or your Counsel. If anybody has a motion to present, the Tribunal are ready to hear it.

Sir CHARLES RUSSELL.—I have, on the part of the Government of Her Majesty, to make an application to the Tribunal which is based on Article 4 of the Treaty and also upon the general jurisdiction of this Tribunal to regulate the order of its proceedings. The application is that the representatives of the United States may be called upon to furnish either the original or an authentic copy of an important Report bearing upon seal life, and that they may be so ordered for the assistance of this Tribunal and in support of the contentions to be advanced on behalf of the Government of the Queen. The Report in question is the Report of an American citizen Mr. H. W. Elliott, and its subject is "Seal life".

It is important that the Tribunal should understand why we think it necessary that this Report should be forthcoming and why we think that the authority of Mr. Elliott on this subject should be brought to the attention of the Tribunal. Mr. Elliott is a gentleman who in the diplomatic correspondence leading up to this Treaty has been vouched by successive Ministers of the United States as an authority without any equal. Mr. Bayard, when he was Secretary of the United States, writing upon the 7th of February, 1888, describes Mr. Elliott as "a well known authority on seal life". That communication is to be found in the United States Appendix to their Case, and I can give my friends the reference, if they have not it at hand. Later, on the 1st of March, Mr. Blaine, who was then Secretary of State in America, on that date quotes Mr. Elliott again, in similar language, as an important authority on seal life; and finally on the 3rd of July, 1890, Mr. Goff, Treasury Agent to the United States, cites Mr. Elliott in this language. He says "There is but one authority on the subject of seal life," and he refers to Mr. Elliott as that one authority.

Now as to the Report, the Report which we desire is one which has peculiar importance from the fact that the authority of Mr. Elliott to make this special Report was conferred upon him by an Act of the Legislature of the United States which came into force in April, 1890. He was appointed under a special Act which authorises the Secretary of the Treasury to appoint some person well qualified by experience and education a special agent for the purpose of visiting the various trading

stations and native settlements on the seal Islands and so forth, for the purpose of collecting and reporting to him all possible authentic information upon the present condition of the Seal Fisheries of Alaska and so forth. The Tribunal, therefore, cannot fail to see that, if it be within the competence of this Tribunal to acquire possession of the information which such a Report presumably contains, that it is a matter of considerable importance.

Now how is this document referred to? The document exists, and that is not disputed by my learned friends who represent the United States. The report was made conformably to the Statute that I have cited a special report to the authorities of the United States, to be found, therefore, among the archives of the department to which it specially belongs. Our information, that is to say, the information of Her Majesty's Government, is and can only be secondhand upon the subject of this Report. Our information is derived from a publication made by Mr. Elliott, in which Mr. Elliott himself refers to this Report, and that publication was made on the 17th of November 1890, and is set out on page 53 of the 3rd part of the Appendix to the Case of Her Majesty's Government. Here it is referred to as having appeared in the columns of an American paper called the "Cleveland Leader and Morning Herald", of the 4th of May, 1891; and it is there signed or purports to be there signed "H. W. Elliott." It also purports to be, although so set out in the journal which I have mentioned, a copy of a communication or part of a copy of a communication purporting to be addressed to the Hon. William Windom, Secretary to the Treasury. It is, therefore, in the documents before the Tribunal, first referred to in the Case on behalf of Her Majesty. It is next referred to in the Counter Case of the United States at page 75; and I rely, and I think it right at once to call the attention of my learned friend to it, not merely on the fact of the reference which I am about to read, but upon the character of that reference, as a justification for the application which I am now making.

It is thus referred to. "The Commissioners", that is the British Commissioners, "also rely on a Newspaper extract which purports to be a summary of a report made by Mr. H. W. Elliott in 1890 to the Secretary of the Treasury to establish several alleged facts. One of these statements in this alleged Summary is that there were 250,000 barren female seals in the Pribiloff Islands in 1890. This is cited by the Commissioners to show the lack of virile males in the rookeries in that year." They then proceed. "An examination of the Extract as published in vol. 3, which is the reference I have given to the Tribunal in the Appendix to the case of Great Britain, "discloses the fact that this statement", that is to say the statement of figures, "appears after the signature of H. W. Elliott, and it cannot, therefore, be construed as a portion of such report. Furthermore, how the Commissioners can question Mr. Elliott's power to compute the number of seals on the island as they have done, and still rely at all on his computation as to the number of barren seals, needs explanation." The Tribunal therefore will see, first of all, the fact of the report is not questioned, but what is questioned is the authenticity of, the correctness of, the extract which purports to be given in the paper from which the British Commissioners of Her Majesty's Government in their Case cite.

Now in that state of things Her Majesty's Government considered that it was of moment that the actual report, or an authentic copy of it, should be at the disposition of those who advised the Queen, to use it as they think right, and to place it before this Tribunal if it throws any important light on any part of the discussion in which this

Tribunal is engaged; and accordingly on the 10th February in the present year the Agent of Her Majesty's Government addressed a letter to Mr. Foster, the Agent of the United States, in these terms. It relates to several documents, and I will only read that part of it which refers to this report. "The undersigned Agent of Her Britannic Majesty's Government has the honor, by the direction of Her Majesty's Government, to give notice that he applies for the production by the Agent of the United States of the following documents or copies of the following documents."—And then, under the third head, the document in question is thus described. "A full copy of the report of Mr. Henry W. Elliott in 1850 specified and alluded to on page 75 of the United States Counter Case". The answer of Mr. Foster to that demand was made in writing on the 16th February 1893, and referring to the document in question (I omit the other parts) this is the answer which the Representative of the United States thought proper to make. "The third document" (that is this report) applied for by Her Majesty's Government Agent is a full copy of Mr. H. W. Elliott's report in 1890 specified and alluded to on page 75 of the United States Counter Case.

"The undersigned begs to make the following statement in relation to the document applied for. The reference cited in the notice of the Agent of Her Britannic Majesty is in the following words", And thereupon is repeated the passage which I need not trouble you with reading again. It then proceeds: "The Counter Case of the United States alludes to a newspaper extract, not to Mr. Elliott's Report, and specifically to the same as published in the Appendix to the Case of Her Majesty's Government." The unwarranted construction placed upon the citation by the Agent of Her Britannic Majesty's Government is obvious.

The next paper extract to which reference is made, is cited by the British Commissioners, and therefore, it is to be supposed, is in their possession. If not, it can be as readily obtained by Her Majesty's Government as by the Government of the United States, which has not the same in its own "exclusive possession", which is the condition precedent required by Article 4 for the production of any report or document specified or alluded to. I will come to the construction of Article 4 in a moment. At present I wish to convey to the mind of the Tribunal what this answer amounts to.

First of all, what does it not amount to? It does not challenge the fact that there is an official report in existence made by one specially charged by the United States with the duty of making that report. It does not deny that that report is in existence, and may be made available should this Tribunal see fit so to direct. But what it does say, in effect, is this:—You first referred to this report. You refer to a newspaper extract. That newspaper extract is not exclusively in the possession of the United States. Your production of it shows that it is in your possession, and you have just as good means of getting that newspaper extract as we, the United States. That is their answer. I agree the answer is perfectly correct, as far as the newspaper extract is concerned. It is equally available for both of us; but what we want is to get the report which is referred to in that newspaper extract: to get that report *in extenso*. Our ground for urging as a matter of good sense and of equity that we must have that report is this; that they have in their reference to that extract challenged its correctness, and its authenticity, and have alleged that the statement referred to as a statement of Mr. Elliott is not to be regarded as a statement of Mr. Elliott, because, as appears in the newspaper

extract, it appears to have been written under and not above his signature, and they take the point that upon the construction which they are pleased to give to the 4th clause of the Treaty, a condition precedent to the production of the original or an authentic copy is that the document referred to in the Case or Counter Case shall have been shown to have been, or to be, in the exclusive possession of one of the parties. With great, deference to those who so contend and respectfully submitting the views which the government of the Queen entertain, that would indeed be a very narrow, and, as we submit to your judgment, an unsound interpretation of article 4.

Now I would ask the attention of the Tribunal while I submit what is the true construction of that article. It turns upon the last clause of that article, beginning with the words "If in the Case". I think my learned friends will probably agree that the earlier part is not material or not directly material to the purposes upon which we now are engaged. "If in the Case submitted to the Arbitrators either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound if the other party thinks proper to apply for it, to furnish that party with a copy thereof." Now I agree that so far as I have read this clause of article 4, it does point to applying only to documents in the exclusive possession of one party, and referred to by that party.

But it is the second branch of this clause upon which I mainly rely. It then proceeds, "and either party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance notice thereof within 30 days after delivery of the Case". The distinction, therefore, between these two branches of this rule is, I submit to the Tribunal, obvious. The first part deals with a document exclusively in the possession of one of the parties, and referred to by such one of the parties in the Case submitted. The second branch deals with a much wider, and much more important matter. It deals with this, that if there exist in the possession of either party the original documents which are important in the elucidation of the truth and in arriving at a proper conclusion upon the facts, then the party who desires to rely upon such document shall not be driven to rely upon uncertain, unsafe, secondary evidence, or partial evidence, or extracts from the document in question; but that the Tribunal shall have the means of assisting that party in putting before the Tribunal the actual, authentic document itself, or an authentic copy of the document itself. Surely that is the reason of the thing.

Lord HANNEN.—You have not referred to the words "adduced as evidence".

Sir CHARLES RUSSELL.—I read that.

Lord HANNEN.—I know you did.

Sir CHARLES RUSSELL.—"Of any papers adduced as evidence", I am coming to that next branch in a moment, but I read the words "adduced as evidence".

Lord HANNEN.—Yes you did.

Sir CHARLES RUSSELL.—In this case we have adduced this report as evidence. We have cited it in our Commissioners' report. We have cited it in the third part of the appendix, page 53, to which I have referred, but that is only what lawyers call secondary evidence of the report. In a court of law, as my learned friends well know, governed by strict rules of evidence as they are understood both in America and

in England, that would not be evidence at all. Therefore before this Tribunal, not hampered by technical rules of evidence, it is at the best only a secondary class of evidence, and if we had the document admitted as it is set out, imperfectly set out, in the documents connected with our Case by the United States as authentic and as reliable, the importance of the question would be here comparatively small. Again, I must emphasize that which is the important point in this case. On page 75 and 76 of the Counter Case the United States,—and, as I see, the Members of the Tribunal have not their books at hand for the moment, I had better read it in full beginning at the second paragraph on page 75,—it reads thus. "The Commissioners"—I have read this already, but I will repeat it,—"also rely on a newspaper extract which purports to be a summary of a Report made by Mr. Henry W. Elliott in 1890 to the Secretary of the Treasury to establish several alleged facts. One of these statements in this alleged summary on Pribiloff Islands in 1890 (section 382, page 40) is that there were 250,000 barren seals."

This is cited by the Commissioners to show the lack of virile males on the rookeries in that year. "An examination of the extract as pub-" "lished in Volume 3 of the appendix to the Case of Great Britain dis-" "closes the fact that this statement appears after the signature of" "H. W. Elliott, and it cannot, therefore, be construed as a portion of" "such Report. Furthermore, how the Commissioners can question" "Mr. Elliot's power to compute the number of seals on the Islands," "as they have done, and still rely upon his computation of the number of" "barren females, needs explanation." Now, paraphrase this paragraph. When they say the British Commissioners rely on newspaper extracts, I ask why should they be called upon to rely upon a newspaper extract when the authentic document exists and is procurable? Why are the United States through their Agents to be considered justified, on page 76, in throwing doubt upon the authenticity of one of the extracts that upon the fact that, extract in part does not represent conclusions of Mr. Elliott and is not part of his report, when the point can be determined not by conjecture or speculation, but by examination of the actual documents in the possession of the United States itself? I find great difficulty, and I say it with all sincerity, in appreciating why it is that this document, which owes its origin to a solemn Act of the Legislature of the United States, should raise what I must, quite respectfully, call the very narrow and very technical objections to this document which are stated in the answer to the application for the document by the Agent for the United States. I base my application, therefore, upon these grounds:—First of all, that we ought not to be driven to rely upon secondary evidence of a document the original being in the possession and under the control of the representatives of the Government of the United States; next, that it is within the terms of Article 4, that this Tribunal should not compel us to rely upon secondary evidence, but may, for their own information and for ours, direct the production of the original or an authentic copy. I say the power is conferred upon this Tribunal under article 4 in the second clause, which I have read; but I say, if there were no such Article at all and even in face of that Article, this Tribunal surely has the right to call for, for the better information of its own judgment, and surely has, inherent in itself, as a Tribunal to determine difficult and somewhat complicated issues, a right to say this is a document which, from every circumstance attending its history, ought to be regarded as one of importance in this controversy, seeing that it was procured at the instance of the executive of the United States itself for the very purpose of informing those who

are advising the Government of the United States on the very questions dealt with or largely dealt with in the controversy now before this Tribunal. These are the grounds upon which I submit that we are entitled to have this document; and I cannot doubt that if the Tribunal or any portion of the Tribunal express its opinion (and I cannot doubt that it must be in the minds of many of them) that it is but reasonable and right that this document should be forthcoming and be judged according to its merits by each member of this Tribunal, I cannot doubt but that further objection to its production will be withdrawn.

The PRESIDENT.—I would ask Sir Charles Russell to be kind enough to put his motion in writing and communicate it to the Secretary of the Tribunal, so that we may have the exact words of the motion before us.

Sir CHARLES RUSSELL.—Certainly.

Sir RICHARD WEBSTER.—I ask to be permitted, Sir, not to repeat, but to supplement, the argument of my learned friend the Attorney General by a reference to one or two other documents in evidence which strongly enforce, in my respectful submission, his contention. You are aware that by Article 3 of the Treaty the printed Case of each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relies, shall be delivered in duplicate; and you are further aware, Sir, that by the earlier clause of Article 4, within 3 months after delivery on both sides of the printed Case, each party may in like manner deliver in duplicate to each of the Arbitrators, and to the agent of the other party, a Counter Case, and additional documents, correspondence, and evidence, in reply to the Case, documents and evidence, so presented by the other party". My learned friend, the Attorney General, has called the attention of the Tribunal to the fact that in the Appendix to the original British Case lodged in September last, there was the best evidence that we could then obtain of the documents in question. It was that which purported to be, under the signature of Mr. Elliott, addressed to a Government official, verbatim extracts of part, and but of part only, of his Report.

Now, Sir, comes the additional matter to which I respectfully call the careful attention of this Tribunal. A difference having arisen between the United States and Great Britain as to the true construction of the Treaty, Mr. Foster asked that some further documents should be supplied (I am stating this of course in a very few words) and accordingly it was by arrangement, which will be found in the letters of Mr. Foster to Mr. Herbert, and of Lord Rosebery to Mr. Herbert, of the 2d September and the 1st October last year, arranged, in deference to the views of the United States, that the report of the British Commissioners should be treated as part of the Case of the Government of Her Britannic Majesty. I need not now, Sir, discuss the merits of that dispute. I will merely say that the Government of Her Britannic Majesty, in furtherance of the desire that this Arbitration should be conducted with the fullest information on both sides, accepted the view put forward by Mr. Foster on behalf of the Government of the United States that the Report of the British Commissioners should be furnished, and should be treated as part of the Case of the Government of Her Britannic Majesty. In that Report, with which I know the Tribunal are familiar, in sections 433 and 832, the Report of Mr. Elliott is referred to in supporting certain statements of fact upon which the British Commissioners relied. We had at that time therefore before us, Sir, what I may call three separate allegations of fact all based upon that, which we had reason to believe was an authentic extract from Mr. Elliott's Report, it having been signed by himself and being sufficient for our purpose.

Had the matter stood there it might have been suggested that that was all we wanted; but the United States, by their criticism, to which the Attorney General has called attention, submit to this Tribunal that it is to reject part of the secondary evidence which has been put forward by Her Majesty's Government, upon the ground that upon the face of the newspaper account of the Report it was to be presumed that in this respect it was not trustworthy; and I beg the Tribunal to notice, that the Government of the United States had in their possession at that moment the original report addressed to the Secretary of the Treasury.

Now I need not again enforce what the learned Attorney General has said on the criticism of the United States with reference to allegations made on behalf of Great Britain, but I now again call the attention of the Tribunal to the Treaty. The original of any paper adduced as evidence is to be ordered by the Tribunal to be produced, if in its discretion the Tribunal consider that it is material or pertinent to the matter before it; and I again remind this Tribunal that it is a rule not only of this, but of all tribunals which exercise judicial functions, that the best evidence is to be at the service of the tribunal if it is possible. That is only in the event of the failure of their being able to obtain the best evidence that secondary evidence becomes either reasonable, or such as the Tribunal should rely upon.

Mr. Justice HARLAN.—Does your motion comprehend the filing of this paper as evidence?

Sir RICHARD WEBSTER.—My motion, Sir, comprehends the production of this paper, so that the original may be referred to by either side, and certainly by the Counsel for Great Britain, as the best evidence—as *the* evidence of the Report which Mr. Elliott made, which we have already referred to in our Appendix. It is already in evidence; we have referred to it in our Appendix; it has been treated by the United States in their Counter-Case as evidence; it is criticized upon the ground that it is evidence, but it is said that a part of it you must reject, because it happens to be written below the signature of the gentleman who purports to make the Report. I ask, suppose it be the fact that in the body of the original Report there are the same figures which are referred to after the signature in the extract given to us, my learned friends who represent the United States would be the first to admit, that if those figures were there they would not rely upon the accidental circumstance that in the particular form in which they were cited by the paper they do not appear, but that they are in the body of the Report to which reference has to be made. I again respectfully press upon this Tribunal that, without saying that a Treaty of this description is not to be construed by the cast iron rules which we as lawyers might possibly apply to legal or conveyancing documents, it is evident that if either party refers in evidence to documents, the originals of which they have not got or have not produced, the Tribunal shall order, if they see it is relevant, the original to be produced. It cannot make any difference in whose custody the original document is. Supposing it happened that this was a document which the United States desired to produce or give in evidence, it would be no answer for us to say, "You have got some means of referring to the contents of that document"; the Treaty has required the Tribunal and has enabled the Tribunal in its discretion to call for originals which form part of the evidence adduced by either party.

Sir, I have but one more word to add. It is, in fact, alluded to in the sense of the Treaty even by the United States themselves, because they do not speak of it as merely a newspaper report of something which Mr. Elliott is supposed to have said. They refer to it as a newspaper

extract which purports to be a summary of a report made by Mr. H. W. Elliott to the Secretary of the Treasury. Therefore we respectfully submit to this tribunal that upon first principles which govern the laws of evidence, in the broadest sense of the term, an original document which has been alluded to by the party desiring to refer to it, which has been made part of their evidence by the original Case and by that which upon the invitation of the United States was to be treated as part of the original Case—the original of that document, we humbly submit to this Tribunal, must be produced; and we further point out that it could scarcely be contended that because the only means accessible to us happened to be in the first instance a newspaper extract from that report, therefore we should be denied access to the original.

Sir CHARLES RUSSELL.—The form of the Order, sir, which I should suggest that this Tribunal should make and which we request that they should make, is this, that the Agent of the United States be called upon by the Tribunal to produce the original or a certified copy of the Report made by Mr. Henry W. Elliott on the subject of the fur seals, pursuant to the Act of Congress of 1890.

The PRESIDENT.—Have the United States anything to reply to this Motion?

Mr. PHELPS.—The disposition, Mr. President, which we shall propose to make of this application relieves us from the necessity of troubling you long upon the subject of its admissibility. The circumstances however that attend, and have heretofore attended this application, and one which preceded it, are such that we have not thought it right to allow the subject to pass without an explanation to the Tribunal of the attitude of the United States upon this subject, because it bears collaterally, in a very important way as we conceive, upon other questions that the Tribunal will hereafter encounter. Now, to begin with, I do not preceive that the remark of my learned friend as to the value of this evidence, is germane to this enquiry. The question is not upon its weight, but on its admissibility. If it were ever so valuable, if not admissible it is not to be admitted. If it were comparatively of no value at all, if it be admissible they are entitled to have it in evidence. Another observation of my learned friend, Sir Charles Russell, to which possibly I attach more consequence than he did, is on the subject of what he terms the general jurisdiction of this Tribunal. On these questions of procedure we respectfully deny that under the Treaty the Tribunal is invested with any such jurisdiction. If you were sitting as a Court, a court of general judicial powers, the incidental discretion that would attend the Tribunal, as we all know, is very large. The Treaty might have invested this Tribunal with such discretion and such powers. It has failed to do it. It has undertaken to specify with great certainty and particularity the method of precedure in bringing before the Tribunal the evidence which they are entitled to consider. I do not enlarge upon this point now, as it will become the subject of discussion in a subsequent motion. I only make the observation, that it may not be thought that we concur at all in the idea that this high Tribunal is invested with any power to admit evidence, or consider evidence, except precisely that which is conferred upon them by the Treaty under which they are constituted.

It is true, as has been stated by my learned friend, that an application was made to the agent of the United States in February for the production of this document, and it was refused upon the ground which he has read to the Tribunal; refused upon a further ground stated later in the letter of the agent, which he has not read. It is

only so far as may be necessary to justify the position of the United States Government on this subject, that I shall trouble the Tribunal with any remarks. If this document is admissible, it is made so by the last paragraph of article 4 of the Treaty, the only one which has any reference whatever to the subject. "If in the Case submitted to the Arbitrators either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof". That is the first half of the paragraph. I shall consider the other further on. It will be observed that the language of this provision is restricted to the Case that has been furnished by either party; not to the Countercase, which is a very different document. Article the third, as has been already pointed out, provides for the delivery in duplicate by each party to the other and to the Arbitrators, at a particular time, of a Case. Article 4 provides for the subsequent delivery by each party to the other, and to the Arbitrators of a Countercase. Both words are used throughout the Treaty. Each has its own meaning, and its own application. It is not claimed on the part of my learned friends that any allusion to this document whatever on either side took place in the Case, certainly not our side; and I believe not on theirs. It is in the Counter Case that the allusion is made, which appears to them to lay the foundation for an application for the document.

Now, it may be said, as has been said, this is a technical construction. That the more liberal view would be to treat the word "Case" in this connection as including the entire submission by the party of his allegations and evidence. The difficulty with that construction is that what comes in in the Counter Case cannot be subject, under the terms of the Treaty, to any reply, contradiction or explanation. The Treaty closes the door, on the delivery of the Counter Case, to the admission of any evidence whatever upon any subject; so that while if a document is so far alluded to in the case of a party as to make it properly the subject of an application for the whole document, so that the party applying for it can in his Counter Case make the proper reply by evidence and allegation, there is a propriety and force in the provision; but if, on the other hand, it is open to the party to call for the production of a document which is alluded to for the first time in the Counter Case, then that document which comes in as evidence for all purposes for which it may be legitimately used, cannot be answered on the other side. That is the reason; and that is one of the reasons assigned by the Agent of the United States in the latter part of the letter which my learned friend has read as one of the grounds upon which this application is declined.

But, to go farther, suppose for the purposes of argument that the word "Case" here includes the Counter Case; what sort of an allusion or specification is it which the Treaty requires as the foundation for an application for such a document?

Senator MORGAN.—Is there no allusion to this paper in the British Case?

Sir CHARLES RUSSELL.—Certainly there is, at page 53 of the Appendix.

Mr. PHELPS.—There is none in ours, and I had the impression there was not in theirs. But that is immaterial, because, as I am going to point out, it is "our" allusion that must be the subject of this application, not theirs. Our first allusion to it, if it be an allusion to it within the meaning of the Treaty, which we deny, is to be found in the Counter Case, in the passage that has been read by my learned friend. "If

either party shall have specified or alluded to any Report in its own exclusive possession without annexing a copy," what is the meaning of that? It is that if either party shall have brought forward by specification or by allusion any document in support of any contention and has relied upon it, and has put it forward so that his Case is in any respect strengthened by the allusion, then at the instance of the other side he shall produce the full copy of the document he refers to. And that provision is founded in the greatest and most obvious propriety. But is a reference to a document in the Counter Case in reply to a part of it that has been brought forward on the other side, such an allusion as the Treaty contemplates? It is difficult to read these words without perceiving what the spirit and object of the provision is, that a party shall not be permitted to fortify himself in any way by a reference to a written document in his own exclusive possession, without giving the other side (if they ask for it) the benefit of the entire contents. But when the other side thinks proper to allude to some copy or extract in their own possession out of a newspaper and a reply is made to that in the Counter Case saying that it is not authority or is not material, have we brought forward the Report as in any way assisting the case of the United States? I do not press the subject, because it is immaterial. I have said thus much in order to state the justification which we think existed, and exists now, for the refusal of the United States in February to produce this document. And if it be said that the refusal was based upon a technical ground, although, the technical ground is well founded correct, I may be permitted to say that this Case will not proceed very far, in my judgment, without disclosing that we should have been perfectly justified, and are perfectly justified, in standing upon any ground in respect to the admissibility of evidence, whether it is technical or not.

A subsequent contention of my learned friend is, under the latter clause of this Article, that either party may call upon the other through the Arbitrators to produce the originals or certified copies of any papers adduced as evidence. Adduced as evidence by whom? By his adversary. Was it ever heard of in a Court of Justice that one party, by referring to a document, can compel the production of it on the other side? Where a document is in the exclusive possession of one side, under the rules of law that prevail in England and in America, before secondary evidence of it can be given by the other, notice to produce it must be given. If that notice is not complied with, the secondary evidence becomes primary evidence, and is admissible. In some jurisdictions, there are statutes under which through the process of a subpœna, production of papers, private papers to some extent, and under various limitations, may be called for. I know of no general rule of law in England or in America that justifies a party in calling upon his adversary to produce a document, I mean to compel his adversary to produce a document, because he has referred to it as part of his Case.

Now let me add another word. This paper was produced and furnished to the British Commissioners during their Session at Washington, and remained in their possession as long as they cared to keep it. It will be seen therefore that there has been no disposition on the part of the United States Government to withhold or to conceal it; and the foundation of the objection which we conceive to be an unanswerable one upon the terms of this Treaty to being compelled to produce it, was the fact that, if produced, it came in as it comes in now, too late to be met by the proper reply.

I shall not follow my learned friend in remarking upon the value of this paper; that is a subject that will engage the attention of the Tribunal later on. It will be seen how valuable it is. It will be seen whether there is any reason on the part of the United States Government why it should be withheld. It is enough for me to say now, that it has not been withheld from the Commissioners, that it would not have been withheld from the other side if it had been asked for in time to prepare a reply; that it was refused because being a document of great volume and extent, it would have come in too late to have been met by the explanation and the evidence which we think should accompany it.

Now, having said all this, Sir, let me say that we shall produce the document, and give our learned friends the benefit of it, with the understanding, which I assume to be, from the language of my friend, Sir Richard Webster, satisfactory to them, that it comes in as evidence for the benefit of either party.

Senator MORGAN.—Mr. Phelps, do you think that the Counsel in this Case before this Tribunal, by an agreement amongst themselves can, at this hour, bring evidence into this cause?

Mr. PHELPS.—I was going to remark upon that, Sir, in a moment. I do not think, as I shall have occasion to say at greater length, that there is any power to bring evidence into this case at this stage. But we do not choose to stand—we prefer that the Government of the United States should not stand in this enquiry, subject to the reproach of having attempted to withdraw or withhold or stifle anything that throws any light upon the subject. The conduct of the whole case I may respectfully submit, as it will sufficiently appear in due time, has been the other way.

Senator MORGAN.—But how can the Tribunal give its consent to exceed its powers merely for the purpose of preventing incrimination or recrimination between the Governments by their counsel in debate?

Mr. PHELPS.—That will be a question entirely for the disposition of the Tribunal. We are making no admission that binds the Tribunal. We are making a concession that binds only ourselves. We say that if the Tribunal at this stage of the case desire to consider this document, we shall have no objection. That is as far as we go. But it must be understood, and that is the object of these remarks, that we in no respect concede what, before the day is over, we shall be called upon to deny most emphatically—the right of a party to introduce any evidence—any further evidence—at this stage or any future stage of the C . . In making the concession, so far as we are concerned, subject, of course, to the judgment of the Tribunal as to the use they will permit to be made of it, it must be understood that it is without waiving in the least the position, that no evidence at this stage can be introduced as a matter of right.

Mr. Justice HARLAN.—It can be lodged, then, as evidence to be used by either party, subject to the judgment of the Tribunal, when they look into it, as to their power to use it.

Mr. PHELPS.—Certainly, Sir, we are not presuming to suggest to the Tribunal what use they shall think proper to make of this document when it comes before them; that is for them to consider.

Senator MORGAN.—Does the same argument apply to that part of the British Case which Counsel have alluded to, which came in after the Case had been placed in the hands of the Arbitrators?

Lord HANNEN.—That is a different question. That depends on other elements.

Mr. PHELPS.—That is a question which will come up later.

Senator MORGAN.—That was referred to and as a case analogous to this, and an authority on this question.

Mr. PHELPS.—That will come up later, under other motions, for discussion, but as the question has been put by the learned Arbitrator, I may say that in our judgment no such evidence can be properly considered. That will be our position when we reach that question. All I desire to say now is that, without conceding, and emphatically denying that the terms of this Treaty entitle Her Majesty's Government to call for this document, we prefer to consent to put it in evidence, with the understanding that, if used at all it is open to both sides, leaving it to the Tribunal to attach such value to it, and to make such use of it as they may deem proper. The whole subject, let me say in conclusion, of the time and manner in which evidence not in reply can be brought before the Tribunal, will come up later and will come up all the way through the discussion of this case.

Mr. CARTER.—Mr. President and gentlemen, in respect to this particular paper there is not, it seems to me, very much importance in this discussion, and I quite concur with my learned associate in his manner of dealing with it; but in respect to our views as to the powers of this Tribunal there is a great deal of importance, and it seems to me that any discussion concerning them, whenever it is brought forward, should be conducted with deliberation, and nothing should be taken for granted.

I am moved to add one or two observations here, solely in consequence of some remarks which were made by our learned friends upon the other side. The first of them which attracted my attention was that the refusal by the agent of the United States to furnish the document in question, when the demand was made for it in February last, and the grounds upon which that refusal was placed, seemed to exhibit a very narrow interpretation of the provisions of the Treaty, and of the necessities of the controversy, and also exhibited a disposition to rely upon technical considerations.

If the object was to indicate that the United States, in their dealing with this controversy generally had been at all disposed to withdraw from the attention of the Tribunal which was to dispose of it any evidence which was pertinent to the merits of it I am very sure that such an imputation would be wholly erroneous. It is our belief that the Government of the United States, at every step during the pendency of this controversy, has exhibited the largest and most liberal spirit in reference to the production of evidence which would be pertinent to the merits. If there was any facility which it peculiarly enjoyed for the ascertainment of truth, it has been ready, I think, from the start to furnish it to the Government of Great Britain. My learned friends upon the other side will remember, and the Tribunal must be aware from the case which has been laid before it, and the papers contained in it, that at the very outset the Pribiloff Islands, which are the arena out of which the controversy arose, were freely thrown open to the inspection of Her Majesty's agents. A special agent was allowed to go out there for the purpose of making enquiries, and for the purpose of gathering evidence which it might be useful for Her Majesty's Government to incorporate into the Case which was to be submitted to the Tribunal. If there was any knowledge in reference to the habits of the seal to be gathered from that Island, if there was any information in reference to the industry carried on upon that Island which might be of any sort of use to Her Majesty's Government, it was freely thrown open. I think the same course has been pursued in reference to documentary

evidence which might be supposed to be in our exclusive possession. I think it will be admitted upon the other side that they have from time to time called for documents to which perhaps they were not entitled under the provisions of the Treaty, and which were yet freely thrown open to them; but I make this observation for the purpose of showing that there has been at no time on the part of the United States any disposition to withhold from this Tribunal, or to withhold from the other side, any evidence pertinent to the merits of the controversy.

We did, however, refuse to furnish this report. And why? The Tribunal must have perceived already that there is something peculiar about this report. I may assume that the Tribunal is familiar with the practice of Governments to print and publish important reports and documents—reports which have been made pursuant to provisions of law. If Commissioners are appointed for the purpose of making enquiries—(appointed by a legislative body—our Congress for instance)—their report is, in the ordinary course of things, published and made known to the world. It already appears as a fact that this was not the case with regard to this particular document. Her Majesty's agent found the extract which he has incorporated in his case in a newspaper. That was the only mode by which it appears he was able to obtain it at that time. Therefore, there is something peculiar about this report. What is that? Well, I am not at liberty to say, because the evidence for it is not furnished by the Case; but I am at liberty to say what well may have been the case,—it may have been a report which the Congress of the United States that authorised the investigation which led to it conceived to be wholly erroneous, wholly unworthy of credit, unworthy of publication, unworthy of adoption. It may have been of that character. It may have been a report which, in the judgment of the Congress of the United States, was inspired by bad motives, and, therefore, not to be made public. It may have been a report which, in their judgment, was inspired by motives hostile to the interests of the United States, and hostile to their management upon the Islands, and for that reason, therefore, not to be published. All these facts, or some one of them may have been true, or may not have been true. Something was true about it—which led to the withholding of that report from the ordinary treatment which is accorded to documents of that character; and that too, long before this controversy arose. Nevertheless, when the British Commissioners were in the United States for the purpose of making their investigation, they wished to have access to that report. It was freely thrown open to them:—They were told "Look at it if you please." It was not withheld. No demand, after the Treaty was framed and in the course of the preparation by the respective parties of the Cases and Countercases—no request—was made to the Government of the United States for the production of that report or for furnishing a copy of it to the other side to the end that they might incorporate it in the Case if they pleased. If such a request as that had been made, the United States could have said in answer to it, "Yes, we will give you the report, but you must take it in connection with some explanatory matter which we will furnish with it. There are reasons why this report has not been made public, and if the report is now to be placed before the public we wish to have also placed before the public the reasons which go to explain it." That course was not taken. On the contrary, the agent of Her Majesty's Government having incorporated into the British case what purported to be some extracts from it printed in a newspaper, and the United States in the preparation of its Counter case being

called upon to refer to the allusion which had thus been made in the British Case to this document, he then serves a written demand upon the agent of the United States that he furnish him with that document as a matter of right.

Well, what if that had been complied with? Why then the Government of Great Britain would have succeeded in obtaining this document, peculiar in its nature, without those explanatory circumstances which ought to have accompanied it, which explanatory circumstances the United States would have had no means of placing before the Tribunal. It seemed therefore to be a proper occasion to look into the Treaty, and see what the provision relied upon for this demand was, and whether it authorised the demand or not.

Now it seems to me, upon looking at the provisions of the Treaty, that it is quite plain that no such demand on the part of the British Government was authorised. The provision of the 4th article is this: "If in the case submitted to the Arbitrators either party shall have specified or alluded to any Report or document in its own exclusive possession without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof." That is the first provision. Well what is the object of that? what is the purpose of it; for when we are interpreting provisions of this sort we must look to see what their object is. Why, it seems very plain. Nothing is more common in judicial proceedings than for one party in the course of his pleading, in making up his allegations, or in introducing his proofs, to make a partial use of a written instrument—not to use the whole of it, but to use a part of it—such part of it as he supposes to favor his own contention, and he does not tell his adversary what the rest of it is. Well naturally his adversary says, "How do I know but that there may not be something in the instrument which favors my contention, or goes to quality the inference which the party who has made use of an extract from it wishes to draw from it"; and, therefore, the law usually furnishes a mode by which, when a part of an instrument has so been used, the production of the whole of it may be compelled by the adverse party. It is the case of a partial use of an instrument. Let me again read this language of the Treaty: "If in the case submitted to the Arbitrators either party shall have specified or alluded to any Report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish, that party with a copy thereof". That would enable either party, as the members of the Tribunal will perceive, when he comes to make up his counter case to put in the rest of the document of which his adversary has made a partial use, in his counter case or such part of it as he may suppose to favour his contention, and thus the whole document, or all that is material in it, is placed before the court or tribunal. Now the Tribunal will perceive the reason why this provision is restricted to the instance where a party has specified or alluded to a document in his case. It is to enable the other party to get the rest of the document, to the end that he may put it in evidence when he comes to make up his counter case. If the allusion is made in the counter case there is no occasion for giving the other party the rest of the document for he has no means then of putting it in evidence, for the preparation of the counter case absolutely concludes all the means furnished by this Treaty for the introduction of evidence before the Tribunal.

I think, therefore, it is quite plain from this explanation of the article in question that the only instance to which it applies is where

one party has made *an allusion* to a document, and (if we interpret it properly), that means where he has made a *partial use* of a document in his case; in that instance the other party is entitled to a copy of the whole upon making a due demand for it.

Now let me call the attention of the Gentlemen of the Tribunal to the other provision, quite distinct in its character and designed to answer a totally different purpose. "And either party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance notice thereof within thirty days after delivery of the case; and the original or copy so requested shall be delivered as soon as may be, and within a period not exceeding forty days after receipt of notice." I will not stop at this moment to comment upon the rather clumsy framing of this provision. It was taken from a somewhat corresponding provision in the treaty which constituted the Geneva Tribunal of Arbitration; and if there were any attempt to really enforce it, it would be found perhaps somewhat difficult to construe its particular terms; but as to its spirit and purpose, its real object and meaning, I think that is apparent upon the face of the provision,—"either party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence". Now that refers to the case where a paper is adduced in evidence—the *whole* of it. In such case the other party, as is often the case in judicial proceedings, may have some doubt as to the *authenticity* of the document,—he may have doubts about that; and, if he has, it is fair that those doubts should be satisfied, and this provision is one for the removing of such doubts. It is an obligation on the party who puts a paper in evidence,—the *whole* of a paper,—to furnish to the other party the original or a certified copy of it to the end that the latter may be satisfied of its *authenticity*. That is the provision.

Now does this case fall within the first of the categories mentioned? Plainly it does not. There is no pretence here that there is any *allusion* of any nature or description by the United States to this document in its *case*. That is not pretended. The allusion, if it is made anywhere or contained anywhere, is in the *counter case* of the United States; and that is a case not provided for by the terms of the Treaty,—not within its letter, and not, as I have endeavoured to explain to you, within its spirit or purpose. That is the first difficulty, and it is an insuperable one, in bringing this motion within the first clause of the paragraph in question.

But there is another difficulty. I have said that it is not alluded to in our Case but in our Counter Case, if at all. But we have not alluded to it there unless when, perchance, a document is mentioned in any way or for any purpose in a Counter Case, that is understood to be an "allusion". Her Majesty's Government in its original Case had alluded to this Report, and had specified and had attempted to put in evidence a certain part of it; and, of course, if it was a document in the exclusive possession of Her Majesty's Government, there would then have been a case in which the Government of the United States might have made a very effective demand for the production of the whole paper. Great Britain *alluded* to it in her Case. Did the Government of the United States allude to it at all? No; they *commented* upon this allusion to the Report by Great Britain. They made certain criticisms in reference to that allusion. Is that making an *allusion* to this Report in the sense of that Treaty by the Government of the United States? It is very plain that it is not. All that the United States did was to com-

ment upon an allusion made by the Government of Great Britain—that is all. If a different interpretation could be put upon the terms of the Treaty, a party would be precluded from denying, qualifying or criticising an assertion of his adversary which contained an allusion to a Report without subjecting himself to the obligation to produce that Report if it was in his exclusive possession; therefore I conceive it quite plain that it does not come within the first clause.

It does not come within the second, certainly. It has been argued by our learned friends on the other side, that the second branch of the clause of the treaty furnishes a means by which this Tribunal may be supposed to be clothed with a certain general jurisdiction and authority to compel the production of documentary, or other evidence, whenever in its judgment it is necessary for the purpose of determining the truth. I have no desire whatever to restrict within narrow limits the authority of this Tribunal, but we must regard the terms of this Treaty and we must adhere substantially to those, otherwise we shall be very speedily at sea and without a rudder or compass. It is, we are all aware, a common incident of ordinary municipal Courts of Justice, that they have an incidental power over the parties to the controversies which are brought before them, to compel such parties from time to time to do such acts and things in the way of furnishing evidence, copies of papers, documents and so forth, as may be supposed to be necessary to the administration of justice in the cases before them. In such cases the parties are private *individuals*. The Tribunal before which they appear represents, and is clothed with, the sovereign power of the State and can do with them as it pleases. That is not the case here. This Tribunal is one specially constituted and clothed with such powers as are specially mentioned in the Treaty, and with no others. The parties who appear before it are not private individuals subject to its authority; they are themselves sovereign states which cannot be compelled. You have no sheriff or other officer at your hand that can compel the action of the parties which are before you, and therefore this suggestion that there is a general jurisdiction in this Tribunal to order the parties to do what it may be supposed proper to do is one which I conceive has no just foundation, and one which cannot be accepted in any degree without leading us into difficulties which it would be impossible for us to find our way out of. We must look to the Treaty for the powers of the Tribunal, and where the powers contained by the Treaty stop, the powers of this Tribunal stop also. My conclusion from this is that we must dispose of this demand, which is now put upon the second branch of the article, according to the language of the Treaty. I have already explained what seems to me to be its plain and manifest purpose. It is to enable one party to call upon the other party who has put a paper in evidence to satisfy him as to its authenticity by producing the original. We do not fall within that category; we have not put this Report in evidence. We have made no allusion to it even, and therefore the United States cannot be called upon under that clause of the article to produce it.

Now, I have thought it proper to state my views in relation to this, not because of the importance of this particular paper, but because it is important that just views should be entertained of the powers of the Tribunal at the very outset of its deliberations. Having said that, I entirely concur with my learned friend that it is not worth while for the United States to withhold this paper. It is not worth while. About its weight, its importance in this controversy, commented upon to some extent by our learned friends on the other side, I will say nothing. If

it happens to get before this Tribunal, it will be subject to our comments and our criticism; and we are quite prepared to make them. We do not conceive it to be worth while to withhold this paper, and give any sort of occasion or foundation for a remark to be made now and repeated hereafter, that here is some very important document full of convincing evidence, if the United States only chose to let it come out. We prefer to waive it, and to remove the occasion for all such discussion as that by putting the document before this Tribunal. As to whether the Tribunal has the power to look into it, that is a question for the Tribunal itself to decide; and that question has quite extended considerations, which I will not now anticipate, but which will be brought forward speedily in the course of the motions which it has become the duty of the Agent of the United States to make; and, with these observations, I will defer any other remarks until those Motions are brought on.

The PRESIDENT. We ask you to put into writing the purport of your reply, as we asked the British Government to state on paper their Motion. So will you be so kind as to put on paper the substance of your reply.

Mr. CARTER.—Does the President mean by that the substance of the argument?

The PRESIDENT.—No, the substance of the reply.

Mr. PHELPS.—That shall be done.

The PRESIDENT.—If you will kindly give it to us categorically, we shall see exactly what are the two contending Motions.

Sir CHARLES RUSSELL.—Sir, I should have thought that this discussion might have been a much briefer one after the statement made by my learned friend, Mr. Phelps, in his very clear argument. His positions were two. He first contended that the Agent the United States was justified in withholding the production of this document, and upon grounds which would put it out of the power of this Tribunal to order its production. That was his first position. His second position was that he was willing to waive any objection and to allow the document to go before the Tribunal, leaving the Tribunal to attach such weight to it as upon its examination they should judge it to deserve. If the matter had rested there, I should have been quite content not to have troubled the Tribunal with any reply at all. But my learned friends have thought it right, and it would not be becoming in me to suggest that therein they were wrong, to branch out into a number of collateral topics, which I respectfully submit are not germane to the particular point which is now before this Tribunal. But before I say a word or two about those topics, I should like to be permitted respectfully to observe upon a view of this position suggested by a question addressed by one of the Tribunal to the Counsel when arguing the case of the United States, namely, the question whether it was competent for Counsel by agreement at this stage to bring in any fresh evidence. That was the purport of the question. Now, as that question, as I conceive, involves a mistake of fact, I wish to remind the Tribunal again how this matter of the Report of Mr. H. W. Elliott in fact stands in relation to the evidence already adduced. This is not, as seems to have been suggested or supposed, the first introduction as evidence of the Report of Mr. Elliott at all. The Report of Mr. Elliott is already legitimately in evidence in the original Case on behalf of Her Majesty's Government. In the Appendix to that Case,—I have given the Tribunal already the reference—Volume 3, page 53,—this Report is referred to, and, therefore, is in evidence,—to use the words of the Member of the Tribunal, is already "adduced in evidence" as part of the case on behalf of Her Majesty's Government.

Mr. Justice HARLAN.—Have you got the page of the case of the British Government which refers to that Appendix?

Sir CHARLES RUSSELL.—I do not know that there is a reference in the case to the particular page.

Mr. Justice HARLAN.—I suppose it comes in under the general evidence filed with the case.

Sir CHARLES RUSSELL.—In the Appendix, yes. That is the way, Sir, in which it comes in, and on that page there is given, first of all, what purports to be a portion of a leader, a newspaper article, copied from the journal to which I have referred, the Cleveland Journal; and then follows what purports to be a part of Mr. Elliott's Report.

Mr. CARTER.—Mr. Attorney, will you give me the place where, as you say, the Report is itself put in evidence—adduced in evidence?

Sir CHARLES RUSSELL.—My learned friend did not hear my answer correctly.

Mr. CARTER.—I am afraid not.

Sir CHARLES RUSSELL.—There is no special reference in the case to this any more than there is a special reference to the hundred and one documents which are referred to here, but all of the documents in the Appendix are put forward as proof in support of the case on behalf of the Queen. Now, that being so, we have a further step to shew, that it is adduced in evidence,—imperfectly adduced because we have not the original document,—in part produced because we have not the whole document. It is further referred to in the British Commissioners' Report at page 77.

Senator MORGAN.—The original Report or the supplemental Report?

Sir CHARLES RUSSELL.—The original Report. We have not yet got, Sir, to the question of the supplemental Report of the British Commissioners, which is a distinct subject which my learned friends on the other side have given us notice they intend to bring before this Tribunal and seek to exclude.

Senator MORGAN.—I have not read that paper, and therefore I made the enquiry.

Sir CHARLES RUSSELL.—I am speaking, Sir, of the original report, and I wish to remind the Arbitrators how this matter stood. I do not want to anticipate the subject of a later motion at all—that would be irregular, but it was the view Her Majesty's Government took rightly or wrongly (that we shall consider hereafter) that anything which bore upon the question of regulations ought not to form part of the original Case on behalf of Her Majesty at all. It is enough to say that the advisers of the United States took a different view, and in obedience and in deference to their view and expressed desire we furnished them with, as part of our original Case, that report of the British Commissioners, and as the Agent of the United States and as my learned friends will recollect that was the subject matter of diplomatic correspondence which is set out in the documents, the result of which, shortly, was that the Government of the Queen standing by the view which they took of what the Treaty contemplated, said they did not regard the Commissioners' report as properly part of the original Case at all. The United States insisted upon the opposite view, and in order to remove what was a cause of friction in the preparation for coming before this Tribunal, the Government of the Queen agreed to furnish then and there a copy of the British Commissioners' report, which had been prepared long before; and that was accepted by the Agent of the United States and agreed by the Agent of the United States to be considered as part of the original Case. We have, therefore, in that Commissioners' report,

again, not one, but several, references to the report in question, Mr. Elliott's report. And then we come to the Counter Case of the United States, and I do not think, with great deference to the ability and ingenuity of my learned friends, that they have made even an attempt to answer the argument which we have founded upon their own reference in their own Counter Case to this report, because if they had contented themselves with saying nothing about it, or with making a passing reference to it without challenging its authenticity, we should have been perhaps in a somewhat different position from that in which we now stand. But a report can be referred to for one of two purposes.—It can be referred to as affirmative and positive evidence in support of a particular view, or views. I conceive this point to be important. A report may be referred to and insisted upon for either of two purposes, either for the positive purpose, the affirmative purpose, of supporting a particular view, or for the negative purpose of saying that that report does not contain something that it is alleged that it does contain. It is the latter reference, and the latter use of that report, which the United States representatives make in their Counter Case, because, not content themselves with what my friend Mr. Carter has been pleased to call an allusion merely to our allusion to the report, they challenge the authenticity and the reliability of our statement in evidence in that report, and say that that which we say is part of the report is not part of the report at all; and therefore they are relying negatively in relation to that report upon the statement that it contains nothing of the kind which we allege in one respect it does contain.

Therefore it seems to me that that is an additional and a strong reason why the whole document should be referred to. Whether adduced for the purposes of affirmative or negative proof, in either case the document itself, when its authenticity is challenged, must and ought to be produced.

Now so far I have been a little led to say what I should not have felt called upon to say, because I wished to recall to the mind of each member of the Tribunal what is the exact state of facts in relation to the reference to this report.

Now I come a little more closely to the matter. I agree most cordially with one observation of my learned friend, Mr. Carter, that the framing of this Article IV—and I think he might even have extended his statement—is of an exceedingly clumsy character. It is not such a document as he would have settled, I think. It is not, probably, such a document as we should have settled; but here it is. I do not suggest, as my learned friends seem to think I have suggested, that this Tribunal can go outside the terms of this Treaty so as to take upon itself powers and jurisdiction that the Treaty does not give it. Nothing of the kind. No such idea is in my mind, nor did I intend to suggest any such idea to this Tribunal; but when you come to matters which are within the jurisdiction and authority of the Tribunal, then I say that neither this Treaty, nor any Treaty, nor any agreement of reference that ever was framed, does in its minute details meet with every consideration that may arise; and that within the fair terms of the Treaty itself, and within the lines of jurisdiction given by the Treaty, it is, as to matters of mere detail, and matters of mere procedure, entirely within the competence of this Tribunal to express its opinion as to what should or should not be done. But I do not really feel that after the statement of my learned friend, Mr. Phelps, I am called upon very much more to argue that matter. I cannot conceive that when the representatives of the United States on the one hand profess their willingness to produce

the authentic document, which is already in evidence in the way that I have pointed out, and when the counsel representing the Government of the Queen join in the request for its production, there can enter into the mind of any member of this Tribunal the least doubt as to the perfect authority of this Tribunal to take that document, to consider it, and to attribute to it such weight as the document itself may properly have attributed to it.

My learned friend, Mr. Carter, made some reference to that report, which I would respectfully suggest to this Tribunal was a reference he was hardly entitled to make. He says that I relied upon the value of the document. I did to this extent—to this extent only. I do not know what is in the document, but I did say that from whatever point of view it was to be looked at, it was impossible not to attribute importance to a document which was made by a Commissioner specially authorized by an Act of Congress to make the report in question upon the very subject of seal life which enters so largely into the present controversy; and when my learned friend, Mr. Carter, suggests hypothetical reasons why that report has not been published, when he suggests that it may not have been published because it may have been considered unworthy of credit, that it may not have been published because it may not have been thought worth publishing—if my learned friend may suggest hypotheses of that kind, I suppose I may equally suggest a perhaps more natural reason—that it was not published because it was not considered favorable to the view for which it was originally designed. But whether that view, or my learned friends' hypotheses be the correct one is not the point we are now considering.

Senator MORGAN.—I understand that report was made sometime before any negotiations—at least before the negotiations had taken shape for the Treaty.

Sir CHARLES RUSSELL.—I am sorry to say, Sir, that again that is an inaccuracy in fact. I want to explain, and it is the last matter that I desire to explain, what the exact position of events, in the order of time, was. The controversy which has resulted in the establishment of this Tribunal began as early as 1886–1887; was going on through 1888, 1889, 1890; and it was not until the 5th April, 1890, that Congress passed an Act under which Mr. Commissioner Elliott was appointed to report upon this very subject matter of seal life.

Senator MORGAN.—I should like to enquire what is the date of Mr. Elliott's report.

Sir CHARLES RUSSELL.—It is somewhere between April of 1890, and December of 1890—between those dates.

Senator MORGAN.—October, 1890.

Sir CHARLES RUSSELL.—I believe the 17th of November, 1890, and, therefore, I think we may well be excused for urging the desirability of this report being forthcoming, when it was a report directed to the subject matter of this controversy; and when the enquiry preparatory to that report was entrusted to a person as to whom the highest character was given by those charged with most responsible positions as representing the executive government of the United States.

I do not think Sir, that there is anything further that I have to trouble the Tribunal with. I have already, in my original statement, put before the Tribunal my construction of the two clauses of Article IV, which are in question; and I do not desire to repeat myself. As I have said, I should not have been led into these collateral observations had it not been that I have been tempted, I am afraid, to do so, by the observations which have been made by my learned friends. I am content to rest the

matter where my friend Mr. Phelps left it very early in the course of his argument, namely, that the document shall be forthcoming, that the Tribunal shall for itself judge of its character; but I wish again emphatically to say that this is not an attempt to introduce evidence not already in the Case. The report is in evidence: imperfectly referred to, I admit, because we had not the original document; and this application, to put it plainly and shortly, is simply that there shall be in its best and most authentic form before this Tribunal that report which is already, but, I admit, imperfectly, adduced as evidence in the case.

Mr. PHELPS.—In compliance with the request of the President, I have reduced into writing the reply of the United States to this Motion, a copy of which will be furnished to the Secretary before the adjournment of the Court. With the permission of the Tribunal, I will read it.—"The United States Government denies that Her Majesty's Government is entitled, under the provisions of the Treaty, to any order by the Tribunal for the production of the document specified in the motion, as a matter of right. The United States Government, however, is willing to waive (so far as it is concerned) its right of objection, and to furnish to the Agent of Her Majesty's Government a copy of the document referred to, for such use as evidence as the Tribunal may deem proper to allow. Not conceding, however, in so doing, that either party at this or any subsequent stage of the proceedings has a right to introduce any further evidence whatever, upon any subject whatever, connected with the controversy. And further stipulating that if the document referred to in this motion shall be used in evidence at all, it shall be open to the use of both parties equally in all its points."

Sir CHARLES RUSSELL.—Oh! clearly, that follows.

The Tribunal then adjourned for a short time.

Sir CHARLES RUSSELL.—Perhaps, as the Counsel for the United States have read their answer to the motion, I ought to read to the Tribunal the form of the order which I propose the Tribunal shall make.

The PRESIDENT.—Will you be kind enough to read it?

Sir CHARLES RUSSELL.—Yes, Sir. "That the Agent of the United States be called upon by the Tribunal to produce the original, or a certified copy, of the Report made by Henry W. Elliott on the subject of fur-seals, pursuant to Act of Congress 1890".

Mr. Justice HARLAN.—You had better give the date of the report, if you can, in that motion.

Sir RICHARD WEBSTER.—The 17th of November 1890.

Sir CHARLES RUSSELL.—We are not sure that is the date, however.

Lord HANNEN.—Sir Charles, is that the form of the order which you asked for?

Sir CHARLES RUSSELL.—That is the form of order which I at present ask for.

Lord HANNEN.—Precisely; I thought so.

Mr. PHELPS.—We did not understand, Mr. President, that this motion would be the subject of any order by the Tribunal upon the party to produce this document. We understood that we produced it by consent and furnished it to the Agent of Her Britannic Majesty's Government, and that the Tribunal would make such order in respect to its reception as it might deem proper. To produce this under an order of the Tribunal would carry the idea that they were entitled to an order for the production of the document, which we do not concede, by any means.

Sir CHARLES RUSSELL.—The matter stands in this way, if I may say so: We respectfully call for the order. My learned friend answers that

by saying: "We say the Tribunal has no authority to make the order, but we waive any objection of that kind and produce it." We are merely fighting about words, I think, and not about substance.

The PRESIDENT.—Practically both parties are agreed; and the Tribunal in consequence directs that the document be regarded as before the Tribunal, to be made such use of as the Tribunal shall see fit.

Mr. PHELPS.—Yes.

Mr. FOSTER.—Mr. President and Gentlemen of the Tribunal, I desire to submit the following motions, which I understand, by consent of counsel, are to be considered together. I will read them first for the information of the Tribunal and of Counsel:

The Agent of the United States desires to bring to the attention of the Tribunal of Arbitration.

Sir CHARLES RUSSELL.—I beg pardon, a moment; but I would respectfully suggest as a matter of the order of procedure.—I am sure that Mr. Foster will not understand that I make any personal objection—that this matter is in the hands of Counsel and it is Counsel who make motions. My learned friends, Mr. Phelps and Mr. Carter, are, I submit, the persons to bring this matter under the notice of the Tribunal.

The PRESIDENT.—We believe that is a matter to be decided between the Agents themselves, and their Counsel. Have not the Agents agreed upon the mode of proceeding before the Tribunal? You know you both represent your Governments.

Mr. TUPPER.—There has been, so far as I am concerned, Mr. President, no understanding or agreement on that point; but I took it for granted that as I appear here to obey the orders of the Tribunal and represent Her Britannic Majesty as Agent, and appear with Counsel, that the argument of all questions coming to the attention of the Tribunal should be in the hands of Counsel; and with that I was personally most content. I supposed, of course, that the Agent of the other side occupied a similar position.

The PRESIDENT.—You know the official representatives of both Governments are their Agents; the Tribunal knows no other official representatives but the Agents. The Counsel act as Counsel of the Government with the Agents. But you must agree between yourselves how you wish to proceed.

Mr. PHELPS.—General Foster was only about to read the motions. He was not intending to address the Tribunal in support of them.

Mr. FOSTER.—Mr. President, before you announce your decision I desire to make a statement. I fully concur with the President of the Tribunal as to my duties. I appear here to present a motion on behalf of the Government of the United States. When I have presented that motion, it will be the pleasure of the counsel of the United States to argue that motion. In the proper discharge of my duty, I rise for the purpose of reading and laying before this Tribunal a motion.

The PRESIDENT.—I must ask you whether you protest against that mode of proceeding? (Addressing British Counsel).

Sir CHARLES RUSSELL.—No, sir; I do not wish to do that at all. I merely interposed because I thought Mr. Foster was under the impression that he thought it was necessary he should introduce it in this way, and we did not conceive it to be so. The matter is in the hands of Counsel who are by the fifth article orally to conduct the argument. This is really part of the argument in support of a particular motion.

The PRESIDENT.—We will not recognize the Agents as arguing the matter. We recognize them as representing the Government. Counsel will argue the matter and we will dispose of it.

Sir CHARLES RUSSELL.—We have no objection to that.

Mr. FOSTER.—I proceed:

The Agent of the United States desires to bring to the attention of the Tribunal of Arbitration the fact that he has been informed by the Agent of Her Britannic Majesty, in a note dated March 25th ultimo, that he has sent to each of the members of the Tribunal copies in duplicate of the Supplementary Report of the British Commissioners appointed to inquire into seal life in Behring Sea.

The Agent of the United States, in view of this information, moves this Honorable Tribunal that the document referred to be dismissed from consideration, and be returned to Her Majesty's Agent on the ground that it is submitted at a time and in a manner not allowed by the Treaty.

I follow that with a second motion for the information of the Tribunal:

The Agent of the United States moves this Honorable Tribunal to dismiss from the Arbitration so much of the demand of the Government of Great Britain as relates to the sum stated upon page 315 of the Counter Case of said Government to have been incurred on account of expenses in connection with proceedings before the Supreme Court of the United States;

And, also, to dismiss from the Arbitration the claim and request of the same Government, mentioned on said page 315, that the Arbitrators find what catch or catches might have been taken by pelagic sealers in Behring Sea without undue diminution of the seal herd during the pendency of this Arbitration;

And, further, to dismiss from the Arbitration the claim of the same Government, mentioned on the said page 315, to show payments by it to the Canadian owners of sealing vessels;

And that all proofs or evidence relating to the foregoing claims or matters, or either of them, be stricken from the British Counter Case, and in particular those found on pages 215 to 229 inclusive, of Volume II of the Appendix to said Counter Case.

The ground of the foregoing motion or motions is that the claims and matters aforesaid are, and each of them is, presented for the first time in the Counter Case of the Government of Great Britain, and that they are not nor is either of them, pertinent or relevant by way of reply to the Case of the United States, or to anything contained therein, except so far as the same may tend to support claims for damages distinctly made in the original Case of the Government of Great Britain, and that so far as they come under that head the matters are irregular as being cumulative only.

I have copies of these motions sufficient to supply the Arbitrators and Counsel of the British Government. I will place them in the hands of the Secretary.

The PRESIDENT.—The Tribunal will be ready to hear the first motion of the United States immediately argued; but the Tribunal must reserve for a later stage of the proceedings the argument upon the second motion, which we do not consider as relevant in the present stage of our proceedings. If the Counsel of the United States wish to speak upon the first motion, we will ask you to restrict your argument to this first motion. I mean the motion which relates to the Supplementary Report presented by the British Government.

Mr. PHELPS.—The reading, Sir, of the motion to which the President has just alluded, and to which, of course, with great deference to the intimation of the Tribunal, I shall at this time confine myself, has disclosed to the Tribunal that it is in itself a motion of very considerable importance, and that it is of still greater importance in the effect of the questions to which it gives rise upon other evidence and other parts of the Case that will be found to be extremely material.

Since the last meeting of the Tribunal, when the written arguments were submitted, and when the case, so far as the hearing of it is concerned, would have been at an end, if the counsel on either side had not desired an oral argument, or if the Tribunal had not directed it, because, as the Tribunal has perceived, the oral argument is not required by the Treaty; it is a privilege accorded to the counsel on either side; it is a

right reserved to the Tribunal to direct it, if in their judgment it should become material. Since then, the Case, so far as the requirements of the Treaty are concerned, was completed, and would have been finally submitted, the Agent of Her Britannic Majesty's Government has laid before the Arbitrators, and furnished to us, a printed copy of a new document, which we have not examined, purporting to be a supplemental report of the Commissioners appointed on the part of Great Britain under the provisions of this Treaty. I cannot doubt that this step was taken under the advice of my friends upon the other side, in the belief that it was in the exercise of a right. The existence of such a right is the serious question which this motion presents.

In the first place. I desire to call your attention to the provision in the Treaty under which the report of these Commissioners comes at any time or in any event before the Tribunal. It is to be found in Article IX. I may usefully read the whole article:

> The High Contracting Parties have agreed to appoint two Commissioners on the part of each Government to make the joint investigation and report contemplated in the preceding Article VII, and to include the terms of said agreement in the present Convention, to the end that the joint and several reports and recommendations of said Commissioners may be in due form submitted to the Arbitrators, should the contingency therefor arise, the said agreement, is accordingly herein included, as follows:
>
> Each Government shall appoint two Commissioners to investigate conjointly with the Commissioners of the other Government all the facts having relation to seal life in Behrings Sea, and the measures necessary for its proper protection and preservation.
>
> The four Commissioners shall, so far as they may be able to agree, make a joint report to each of the two Governments, and they shall also report, either jointly or severally, to each Government on any points upon which they may be unable to agree.
>
> These reports shall not be made public until they shall be submitted to the Arbitrators, or xx it shall appear that the contingency of their being used by the Arbitrators cannot arise.

I will now read Section 7 of the Treaty referred to in Article IX:

> If the determination of the foregoing questions——

the five questions propounded in the preceding Article.——

> If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring's Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend; and to aid them in that determination the report of a Joint Commission to be appointed by the respective Governments shall be laid before them, with such other evidence as either Government may submit.

It will be perceived that the Treaty provides, in the first place, for the appointment of a Joint Commission, in the hope—I am justified in saying certainly, so far as the Government of the United States is concerned, and I doubt not, so far as Her Majesty's Government is concerned—in the hope and confident belief that such a conclusion would be reached by that Commission as should obviate the necessity of any further controversy, negotiation or arbitration. If the Commissioners had been fortunate enough to agree, such would unquestionably have been the result; but it is provided—and we shall have occasion in the course of this discussion to point out how these provisions originated in the negotiation,—I am dealing with them now only as they find place in the Treaty—it was provided that if this Commission should fail to agree upon such Regulations as the Government should be willing to adopt, then the Arbitration which is now in progress became necessary, which otherwise never would have taken place; and in that

event, one of the questions to be submitted to the Tribunal, in the contingency that certain questions, certain claims of right on the part of the United States Government should not be supported, was what Regulations should be prescribed by this Tribunal for the concurrence of the two Governments, for the object which both had in view in all these negotiations, in all these proceedings, from beginning to end—the protection and preservation of the seal race in the Behring Sea and the North Pacific.

Now, the reports thus provided to be laid before the Tribunal if that question should engage their attention, are made evidence. They are made evidence irrespective of the character of their contents. It is beyond question that whatever these Commissioners chose to embody in the report, their opinions, their information, their conjectures—all become evidence for what they may be thought to be worth in the estimation of the Tribunal, but not to be rejected. It is not open to either party to say in respect to the contents of these reports, "This passage is hearsay; that is conjecture; the third is opinion; the fourth is vague and general information, and therefore it does not constitute legal evidence, and must be discarded in the consideration of the case". We cannot say that, because the Treaty which provides for the appointment of these Commissioners, which provides to them certain opportunities for informing themselves makes their report evidence; not conclusive evidence, not in all parts of it equally forcible evidence, but evidence that is to be admitted.

It will be perceived, therefore, that the evidence afforded by the reports of these Commissioners on both sides—and these observations apply equally to both sides—have an unusual character; that is to say, much of their contents, which if it were undertaken to be put into the Case through the mouth of any other witness might be properly objected to as not evidence, is made evidence here. And it will be seen, furthermore, that unquestionably it was the expectation of the Treaty that the reports of the Commissioners on both sides would engage the serious consideration of the Tribunal. It is made not only evidence to a larger extent than other evidence could be; it is placed upon somewhat a higher plane than any other evidence would be, so far as the authors of it are concerned.

Now these Commissioners failed to agree, except to a limited extent, there was a Joint Report to a small, but in our judgment, to a very important, extent, which was laid before the Governments, and has already undoubtedly attracted the attention of the members of the Tribunal. But on many points of great importance they failed to agree; and the consequence was that under the provision of the Treaty, separate reports were made by the British Commissioners to their Government, and by the American Commissioners to theirs; and those reports have found their way, properly enough, into the Case, and they are already before the Tribunal for such consideration as they may be thought to be entitled to.

After this Case is closed, after all the successive steps which the Treaty provided for have been taken, after the Case and the Counter Case and the written argument have all been submitted; after the Case has come to an end, except so far as the decision and award of the Tribunal is concerned, unless one or more of the parties, or the Tribunal itself should avail of the right under the Treaty to have an oral argument, we are presented with a printed volume, purporting to be, as of course it is, a supplemental report of the British Commissioners. Now, what is that? As I have said, we have declined to

examine it or to receive it. I cannot speak of its contents, therefore, in particular. It is a body, unquestionably, of facts, statements, allegations and matter which becomes evidence; which the Tribunal must treat, if they receive it at all, as evidence; which may be, and we are bound to presume if our learned friends are to put it in at this stage, is very important evidence. It may be, for all we know, the evidence that may determine the conflicting points in this case. It may be the evidence that shall bring you to a conclusion upon this, that and the other important question in dispute; the new evidence contained in the supplementary report may settle these questions and bring us to a decision that, without it, we should not have.

Now then, what is the exact proposal? Without yet looking into the letter or the spirit of this Treaty, what is the exact proposal that is involved by the offer of this evidence at this time? It is that there shall be put into the case, not only subject to the consideration of the Tribunal, but commended by the terms of the Treaty to the especial consideration of the Tribunal, a new and important body of testimony, similar, I presume we have a right to suppose, to their previous report. Can we reply to it? Can we contradict it, explain it, impeach it, modify it? The door is absolutely closed. It is not in the power of the Tribunal to permit any such reply. It is not in our power to make it, if the Tribunal should undertake to give us the opportunity.

The evidence upon this subject is at the ends of the earth. It is in Alaska and British Columbia and California and Asia. It is all over the world. It is utterly impossible for us to attempt at this day to introduce any evidence in reply to this document; and it is equally impossible for the Tribunal, who are called upon by the Treaty, if possible, to determine this Case within three months from the time of its submission, to afford us the opportunity.

The result is that if our learned friends are right in supposing that they are entitled to put in this evidence at this time, a mass of evidence goes into the Case without the possibility of reply, presumably of the highest importance. Now, I shall be glad to know if in the proceedings of any tribunal that ever sat judicially for any purpose, since the principles of justice came to be known, any such proceeding was permitted, as that a party shall have his cause decided upon the determination of a question of fact, based upon evidence that he never saw and never had an opportunity to reply to? Is it possible to carry this question another step unless it is found that the Government of the United States has been foolish enough to have brought itself by a distinct agreement into such an extraordinary position as that? An arbitration to settle facts that are in grave dispute, and must be determined upon evidence. On what evidence? Evidence *ex parte*, evidence that the party against whom it was produced was never confronted with and never had an opportunity to answer, evidence that, so far as the Tribunal knows, may be true or may be subject to complete contradiction.

Now, let us look at the provisions of this Treaty and see upon what ground it has been claimed by the learned Counsel or may possibly be claimed by any Counsel, that this state of things shall be brought to pass. It will be seen in the first place, that so far from this Treaty in any of its parts, or in any of the spirit that is to be derived from any of its parts, contemplating such a result, or leaving it open to inference that there may be such a result, it is sedulously excluded. It is provided in the 3rd Article. "The printed Case of each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relies, shall be delivered in duplicate to

each of the Arbitrators and to the Agent of the other party as soon as may be after the appointment of the members of the Tribunal, but within a period not exceeding four months from the date of the exchange of the ratifications of this Treaty". That is the first step, that as soon as possible, and not later than four months from the ratification of the Treaty, the Case, the documents, the allegations, the proofs which each party relies upon shall be not merely laid before the Arbitrators but shall be furnished to the other party.

Senator MORGAN.—"Printed".

Mr. PHELPS.—Printed, and laid before the other party. For what purpose? To give the other party that opportunity of reply without which no administration of justice can take place, or ever undertook to take place. That is what it is for. The next, Article 4, provides that "Within three months after the delivery on both sides of the printed Case, either party may, in like manner, deliver in duplicate to each of the said Arbitrators, and to the Agent of the other party, a Counter Case, and additional documents, correspondence, and evidence, in reply to the Case, documents, correspondence, and evidence so presented by the other party". There is the opportunity on each side for a complete reply to the evidence contained in the printed Case previously delivered. Then it is provided in the next clause,—I need not read it *in extenso*—that if either party finds that time too short to complete his reply, he may give notice within a certain time, and an additional period of sixty days beyond the three months is allowed him. So sedulous is the Treaty in respect to giving this complete opportunity of reply, that, in addition to the three months allowed primarily, it is at the option of either party to require two months longer.

Then follows the provision that was under discussion this morning, by which it was carefully provided that, if any documents were alluded to or specified on either side in support of their case, on demand of the other side they should be forthcoming, and that if any document was put in evidence, the other side might demand a sight of the original or a certified copy if he questioned its authenticity. And I am reminded that in pursuance of this provision, Her Majesty's Government did ask for the extension of sixty days for the completion of their Counter Case which was, of course, accorded. It was a matter of right. Then Article 5: "It shall be the duty of the Agent of each party, within one month after the expiration of the time limited for delivery of the Counter Case on both sides, to deliver in duplicate to each of the said Arbitrators and to the Agent of the other party a printed argument shewing the points and referring to the evidence upon which his Government relies. Either party may also support the same before the Arbitrators by oral argument of Counsel; and the Arbitrators may, if they desire further elucidation with regard to any point, require a written or printed statement or argument, or oral argument by Counsel, upon it." Those are the successive steps by which the case is to be brought before the Tribunal; first by the Case, second, by the Counter case or reply, third, by the written argument, fourth, if it is desired by the parties or the Tribunal, by the oral argument.

Now let me remark again, as I had occasion to remark this morning, there is no line in this Treaty which professes to confer upon the Tribunal any authority over this system of procedure except to enforce it as it reads. It is not allowed to the Tribunal to say that, though the Case is required to be filed within four months, it may be filed within six. It is not allowed to the Tribunal to say that the Counter Case, if not filed within five months, may be filed in seven, or that the written

argument provided for may be furnished two or three months after the Case. All that discretion, as everybody knows, does attend the jurisdiction of any established judicial Tribunal having general judicial powers. But in this case these two countries having constituted a special Tribunal for the decision of this special Case alone, have thought proper to not merely constitute the Tribunal, but to define and limit and prescribe with the utmost particularity all the steps of its procedure.

Then, recurring to Article 7, it has been said on the part of Her Majesty's Government, because as we shall see, this subject has been the occasion of correspondence, it has been assumed that the question of regulations submitted to the Tribunal was not to be taken up or entered upon until the hearing upon the previous questions in the Case had been completed and the decision of the Arbitrators announced; that is to say, that the Treaty provides for special separate arbitrations by the same Tribunal. That the Case is to be completed, argued and submitted upon the five previous questions, that a decision is to be reached and an award is to be made, and then if that award should be one way, that a new hearing upon new evidence, upon new argument was to take place on question six. Well, passing for this moment, the question whether there should be a separate hearing, which we altogether deny as a construction of the Treaty, the enquiry is, upon what evidence are you to enter upon the question of the Regulations, if you ever do enter upon it—not at what time, not upon what oral argument, but upon what evidence are you to enter upon a question which depends exclusively upon evidence and proof?

Other questions in this case involve important considerations of law, and some of them possibly are purely questions of law. The question of Regulations, if the Tribunal should ever reach the determination of it, is purely a question of evidence submitted to a Tribunal who are not chosen for their familiarity with the facts upon which it depends, who from the very nature of their high position and employment must be absolutely ignorant on the whole subject till they are enlightened by evidence. What Member of the Tribunal, what gentleman who could even have been thought of as a proper Member of it is expected to understand the business of seal life and seal killing and seal breeding, and all its incidents that now encumber this case to such an extent that one can never be sure that he has mastered it?

"The Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination the report of a Joint Commission to be appointed by the respective Governments shall be laid before them, with such other evidence as either Government may submit." What other evidence? How taken? When? How replied to? How brought before the Tribunal? The Treaty is absolutely silent, unless it is the evidence which in the Articles I have already read is provided for, to be set forth in the Case and the Counter case, and to be dealt with in the Argument. While the Tribunal is invested with no power to take testimony, or to order the taking of testimony, or to fix a limit of time within which it should be taken, or the manner in which it should be made known to the other side—while there is absolutely no suggestion of such a provision, nor the conferring of any general jurisdiction that would include it, still it is spoken of as "such other evidence". Why it is the irresistible conclusion from the reading of this Treaty, taking it upon those common rules of construction that regard in the first place the object in view, and secondly, the context of the whole instrument and not detached

words which standing by themselves may be consistent or inconsistent with one construction or the other. If the words are not decisive in their meaning, if they are not conclusive, if they are open to interpretation the resort is to the context of the Treaty, and the object and situation of the parties, as throwing the best light upon the meaning of the terms.

Therefore passing altogether the question of when the Tribunal is to hear argument upon this question, what evidence are they to consider when they do undertake to determine it. That is made perfectly clear when we find that no evidence can come before it in any way that the Treaty provides or in any way that the Treaty authorises the Tribunal to provide, except in the Case and the Counter Case. That is so carefully, so sedulously provided, in order to secure to both parties the right of putting in all their evidence and the right of replying to all the evidence that is introduced on the other side. It is said however, that under the peculiar wording of article nine there is further encouragement to be found for the suggestion that other evidence may be submitted, at least so far as the reports of the Commissioners are concerned. These reports, says the Treaty, shall not be submitted to the Arbitrators if it shall be found that the contingency of their being used by the Arbitrators cannot arise. It is said that this contingency is the contingency of the decision; that it is the contingency whether the Arbitrators shall decide in favor of or against the claims of right which the United States Government have set up. We regard that construction as altogether erroneous. It is the contingency of the Arbitration itself—the contingency of there being any Arbitration, not the contingency of the decision on the previous question that the Arbitration shall reach, if it takes place.

Before, however, I proceed with what I had begun to say on the subject of the term "contingency" in the ninth article, I should have drawn the attention of the Tribunal to the history of the language of article seven, which I have been previously considering. With your permission, I will recur to that subject for a moment, long enough to point out how this language came to be employed. The Treaty, as I need not say to any judicial eye that has perused it, is a piece of patchwork. It has been reached in the process of a long negotiation, *here* a little, and *there* a little—*now* a provision *then* a provision, and most unfortunately it was not submitted, after all these pieces of patchwork were brought together, to the revision of such a legal mind as would have tried to make its language consistent with its spirit. It is idle to deny that the document is full of expressions, each of which taken by itself would be found to be altogether inconsistent with something else.

We are required for instance to furnish a written Argument within thirty days after the Counter Case is filed; but the Treaty requires that in twenty days the Arbitrators shall assemble and "immediately" enter on the decision of the Case. The written argument then comes in ten days after the Tribunal have decided the case. That is only an illustration.

Mr. Justice HARLAN.—It is not "decide", but, "proceed to examine".

Lord HANNEN.—And "consider it." No one could have been so sanguine to imagine it could be decided immediately.

Mr. PHELPS.—It is to be presumed that a Tribunal of such distinguished members as this would not have considered this case for ten days without forming some opinion upon it.

Senator MORGAN.—We might have spent that much time in the question of what our powers are, might we not?

Mr. PHELPS.—Well, Sir, that is not for me to say, but no doubt some time may be usefully spent on that point. What I was about to remark in regard to Section 7 is this—that it was originally proposed by the United States in very different language. In the first volume of the Appendix to the United States Case, at page 286, the Tribunal will find the first draft of article 6, which is very different from the language that appears in the Treaty. I need not stop to read it. It is enough to remark, as it is in print before you, that it is a totally different Article from the one that is now in the Treaty. It was objected to by Great Britain, and upon what ground? Solely upon the ground that Her Majesty's Government was sedulously anxious (you will find that in the letter of Lord Salisbury to Sir Julian Pauncefote of February the 21st, 1891, which is in the same volume at page 294) in framing this Treaty, to separate the question of Regulations from the claim of right.

The position of Her Majesty's Government was, that to regulations—which are not a matter of right—but are for the discretion of the Tribunal—the concurrence of Great Britain is necessary, and though the Tribunal has power to prescribe that the concurrence shall take place, yet at this hearing the question of right on the part of the Government to make its own Regulations, and the regulations to be prescribed by arbitration, if it has no such right, should not be considered together. It was in reply to that, as the correspondence shows, if you will turn to that, the letter at page 310 of the same volume from Mr. Wharton to Sir Julian Pauncefote of the 25th of June, 1891, was written. He quotes Lord Salisbury's objection to the letter to which I have previously referred in these words: "In the note of Lord Salisbury of the 21st of February last,"—the letter I last referred to, "he states his objection to the sixth proposition, as presented in the letter of Mr. Blaine of December 17th, 1890, in the following words.

"The sixth question, which deals with the issues that will arise in case the controversy should be decided in favour of Great Britain, would, perhaps, more fitly form the substance of a separate reference". That letter I may observe, was the first and last allusion in all this protracted correspondence to the idea of making the question of Regulations a separate reference. "Her Majesty's Government have no objection to referring the general question", he proceeds to say—"to referring the general question of a closed time to arbitration, or to ascertain by that means how far the enactment of such a provision is necessary for the preservation of the seal species; but such reference ought not to contain words appearing to attribute special and abnormal rights in the matter to the United States". And the previous draft that I have referred you to on page 286 was open to that objection. It was so drawn that it appeared to confer upon the Tribunal the power to prescribe Regulations which presupposed rights of jurisdiction on the part of the United States. So that if Regulations had been so prescribed by the Arbitration, it might not have been clear whether they proceeded on the ground that they were Regulations which the United States had a right themselves to prescribe in the exercise of an existing jurisdiction, or whether in the absence of any such jurisdiction they were regulations such as the Tribunal thought, by the concurrence of the Nations, ought to be adopted.

Senator MORGAN.—Do you mean jurisdiction within Behring Sea?

Mr. PHELPS.—I do not remember at this moment the application of the language to that suggestion, whether it was to Behring Sea alone, or to the North Pacific, but we shall claim, when we come to the discussion of that subject, that the Arbitration refers to all the waters which the seals frequenting Behring Sea habitually resorted to.

Senator MORGAN.—That was introduced into the negotiation later.

Mr. PHELPS.—Yes. Mr. Wharton on the part of the United States proceeds as follows:—"I am now directed by the President to submit the following, which he thinks avoids the objection urged by Lord Salisbury". Then he submits the draft which is now found in the Treaty.

Senator MORGAN.—Would you allow me to ask, if it does not interrupt you, what was the date of the submission of that draft?

Mr. PHELPS.—That letter is dated the 25th June, 1891. The letter of Lord Salisbury stating this objection is dated February 21st; there was intermediate correspondence, of course, but the decisive reply which met the point of the letter of February 21st did not come till June 25th, and then it was satisfactory to Her Majesty's Government, and the Article was put into the Treaty in the language Mr. Wharton proposed.

Senator MORGAN.—After four months' consideration.

Mr. PHELPS.—Perhaps it was rather more, but, at all events, four months' consideration.

This review of the language of that Article will show that there is no particular significance to be attached to these words "further evidence"; that they are, so far as that section is concerned, what might almost be called accidental words, referring to a subject which it was not the purpose of that section to deal with—referring to another section in the Treaty. Therefore, we must go to the other section in the Treaty to find what the "further evidence" means, and then we are brought to the conclusion which I expressed before, that it can have no meaning except the meaning that it necessarily implies—the evidence which the Treaty otherwise provided for.

Senator MORGAN.—Where are those words "further evidence"?

Mr. PHELPS.—In the 7th Article.

Lord HANNEN.—No, it is "Other evidence".

Senator MORGAN.—Yes.

Mr. PHELPS.—Yes, it should be "other". It leaves this singular alternative. If the "other evidence" means the evidence provided for by the Treaty, and embodied in the Case and Counter case, then it is all intelligible and plain; but if it does not mean that, it provides or rather it contemplates, I should not say that it provides, because there is no provision, the submission to the Arbitration of evidence, the taking of which, the presentation to the other side of which—the argument of which—is not provided for at all; and without investing the Tribunal, I repeat, with any power of meeting that emergency as a Court of Chancery might meet it, who could say that such a time should be allowed to the Complainant to take his testimony, and such a time to the Defendant to answer it, and then such a time to the Complainant to reply. There is no such provision as that, and we are brought to the alternative which is impossible here, because there is a justice of procedure as well as a justice of judgment, and there can be no justice of judgment unless it is founded upon justice of procedure. There can be no such thing as a just judgment which is founded upon evidence with which the other party has never been confronted.

Now, Sir, I recur to what I had begun to say on the subject of the word "contingency" in the ninth article, because we have been apprised in previous correspondence of the ground upon which the proposal to give this evidence is intended to be supported. The reports it is said shall not be made public till submitted to the Arbitrators, or until it shall appear that the contingency of their being used by the Arbitrators cannot arise. In the first place, that has reference merely to the pub-

lication of the reports; but still it is useful to see what the term "contingency" means there, that is to say, what it refers to. Does it refer, as my learned friends will contend, to the contingency of the Tribunal deciding against the United States on the five questions that are first propounded, or does it refer to the contingency of there being any arbitration at all? There again we are enlightened by referring to the correspondence. When we look into the history of that Article which was likewise the "child of travail", when we see how that article came to pass in the form which it has assumed, we see what that contingency means. The original theory or desire of both these Governments, I repeat, was that this Commission would settle the dispute; that if they went to the islands—if experts selected for the purpose examined the subject exhaustively—more exhaustively than you can examine it on evidence, that they would be sure to agree, inasmuch as they started with a common object.

That was the view of the Governments; but whether all the Commissioners acted with that intent or not, is a very different question, which will engage your attention at a later stage of this hearing. That the Governments started with the idea on both sides that this valuable animal should be preserved, in this its last resort on earth, from extermination as a common interest they have made plain in various ways. Why it was that they did not succeed will be the subject of discussion before we cease to trouble you with the consideration of this Case. It is immaterial now. These two provisions that are now embodied in the same Treaty were originally separated.

Great Britain for a long time, (I cannot detain you to wade through all this correspondence, but if you should care enough about this point to run through it, you will perceive that it supports what I say, and I think that my learned friends on the other side will not question it,) Great Britain for a long time was pressing the proposal of this Joint Commission. It was not received by the United States with favor in the first place, but still it was pressed with diligence and ability by the British Government, and finally the United States gave way, and two Agreements were made, (one for the joint Commission) which are now embodied principally in article 9 of the Treaty of Arbitration. If the Commissioners agreed, there would be no occasion for any Arbitration.

Lord HANNEN.—Where is that embodied in the Treaty? Is that anywhere embodied in the Treaty that, if the commissioners agreed the Arbitration would not go on?

Mr. PHELPS.—No, your Lordship, it is not. I am referring to the diplomatic correspondence, which, upon the reference I shall endeavor to give will shew very plainly that the Government hoped and expected that the Commissioners appointed would settle this dispute; if they failed to settle it then it was to be referred to arbitration. If they settled it, the questions of right, as the Government then regarded the Case, became immaterial, as all that the Government of the United States wanted was the preservation of the seal. They did not care to have a decision upon an abstract question of immaterial rights. It is the interest of no nation to challenge decisions such as that.

I shall have occasion, when the report comes to be considered, to enlarge upon these points; all that I am upon now is the question what does the term "contingency" refer to in the ninth Article? I say that the previous correspondence shows that it refers to the contingency of any Arbitration being necessary at all, not to the contingency of what decision the Arbitrators should make if they made any.

I refer to the letter of Sir Julian Pauncefote to Mr. Blaine of April the 29th, 1890. Mr. Blaine had become Secretary of the United States, and the correspondence is contained in the 3rd volume of the Appendix of the British Case. As late as that date Sir Julian Pauncefote, in an elaborate letter to Mr. Blaine, encloses a proposed Treaty. He encloses the entire draft of the Treaty which, as he thought, embodied the views of the two Governments as they existed at that time, and which he seems in his letter confidently to have anticipated would have been accepted by the American Government. It was not accepted, but not upon any difficulty about the point I am now talking about; whoever will take the trouble to go through the pages will see that the draft then submitted by Sir Julian Pauncefote which is a very elaborate draft from Lord Salisbury founded the objection not on this point but others; and, as illustrating what the Governments were then trying to accomplish, his Treaty contains these points. This is the first Article: "The High Contracting Parties agree to appoint a mixed Commission of Experts who shall enquire fully into the subject and report to the High Contracting Parties within two years from the date of this Convention the result of their investigations, together with their opinions and recommendations on the following questions". Then it states five questions, which I need not read, having reference only to the best method of protecting the seals. Then Article 2: "On receipt of the Report of the Commission and of any separate Reports which may be made by individual Commissioners, the High Contracting Parties will proceed forthwith to determine what International Regulations, if any, are necessary for the purpose aforesaid, and any Regulations so agreed upon shall be embodied in a further Convention to which the accession of the other Powers shall be invited".

Then the third Article is.—"In case the High Contracting Parties should be unable to agree upon the Regulations to be adopted, the questions in difference shall be referred to the Arbitration of an impartial Government who shall duly consider the Reports hereinbefore mentioned, and whose Award shall be final, and shall determine the conditions of the future Convention." That is where these Governments stood on the 25th of April, 1890.

Great Britain I repeat, pressing to have the subject determined by the mixed Commission, willing to provide that if the Regulations reported by the Commission should not be adopted by the Government, that an Arbitration should take place to determine what Regulations should be adopted. The first suggestion was that it was to be referred to the Governments. This ultimately took a different shape, and resulted in the formation of the present Tribunal. In the letter of Sir Julian Pauncefote transmitting the document which I have read he says. "The draft, of course contemplates the conclusion of a further Convention after full examination of the report of the mixed Commission. It also makes provision for the ultimate settlement by Arbitration of any differences which the report of the Commission may still fail to adjust whereby the important element of finality is secured, and in order to give to the proposed arrangement the widest international basis the draft provides that the other Powers shall be invited to accede to it. The above proposals are of course submitted *ad referendum*, and it only now remains for me to commend them to your favourable consideration and to that of the Russian Minister. They have been framed by me in a spirit of justice and conciliation and with a most earnest desire to terminate the controversy in a manner honorable to all parties and worthy of the three great nations concerned."

This patchwork took and re-took shape, and was turned over in this correspondence, which was very protracted; and when, at last, one section after another, under different circumstances, and at different times had taken form and had been brought together, from that it will be seen, by travelling through this correspondence from beginning to end, where this word "contingency" came from.

It is the contingency of there being any Arbitration; not the contingency of the decision; and yet, as has been pointed out by one of the learned Arbitrators, when you come to embody them together, and put in not only Article 9 but Article 7, there is room for saying that since the Arbitrators are not to determine the Regulations until they had determined the rights; peradventure the contingency that is referred to in Article 9 is the decision that is spoken of in Article 7.

The PRESIDENT.—Possibly, Mr. Phelps, if you are going to begin a new point it is better for us to adjourn till to-morrow.

[Adjourned till to-morrow at 11.30.]

THIRD DAY, 5TH APRIL 1893.

The PRESIDENT.—Now, Mr. Phelps, will you kindly continue your argument?

Mr. PHELPS.—I had the honor, Mr. President, on yesterday to consider at a length for which, in view of the importance of this question, I shall not apologise, the construction of this Treaty as bearing on the questions of when and how the evidence on which the Tribunal has to proceed shall be submitted to its consideration. I have spoken of this Report which it is proposed to put in, as a piece of evidence merely; evidence invested, however, by the terms of the Treaty with a broader scope and a higher character than is afforded to other evidence. I remarked that I had not examined the Report, and that I could not speak from knowledge in respect to its contents. I have been since informed, and if I have been inaccurately informed I shall be subject to the correction of my learned friends, that this Supplemental Report, as it is called, of the British Commissioners, contains in a sort of Appendix a new mass of evidence; depositions of witnesses bearing on the questions of fact in the case. So that it is not only proposed to put in at this stage, if my information is right, a further Report of the Commissioners, but a mass of testimony of witnesses testifying upon oath in respect of the facts reported. Now, if that is so, is it possible to carry this discussion any further? Can it be conceived, after the particular provisions of this Treaty in respect of the time and manner of the submission of the evidence, that at this late stage, when we are just rising to address the Court in an oral argument that might not have taken place at all,—for as I have pointed out the Treaty does not "require" it; it only "allows" it,—that at this stage, not merely this supplemental Report that we are objecting to, but a mass of *ex parte* testimony coming from witnesses we never saw, that we cannot possibly reply to, that contains facts ever so erroneous, untrue or impeachable we cannot show it,—that such evidence is to be brought in, and perhaps turn the decision of the case, on the important facts that underlie it.

Two theories have been propounded by the respective parties, upon the construction of the Treaty, in respect to the method of procedure. As I have remarked this point has been the subject of some diplomatic discussion, which I shall ask the attention of the Tribunal to, and the views of the other side have been communicated to us in a letter which accompanied, I believe, the notice that this Report would be offered, so that we are advised of the position which the Counsel for Her Majesty's Government take. Their theory is this: That there are to be, in effect, two hearings, two Arbitrations, two awards, first upon the five questions that are propounded in the Treaty, next in the event that those questions should be decided in favor of the British Government, a further hearing upon the subject of Regulations, and that on that hearing fresh evidence, other evidence not theretofore in

the case, is to be admitted. That is their view. We deny altogether that the treaty contemplates any such thing as two hearings or that the Case discloses any propriety for such a method of procedure; I do not say necessity, but any propriety.

The language of the article is: "If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur seal in or habitually resorting to Behring sea, the Arbitration shall then, determine", not that they shall "then hear", not that they shall "hold a new session to receive evidence not before placed in their hands", not, I repeat, that there "shall be a second Arbitration", but "that they shall then determine".

It is the common case, the very common case in judicial proceedings, where a case presents different questions, the decision of one of which one way supersedes the necessity of deciding the others;—as where a liability in an action is denied, if that contention is sustained, and it is found that the defendant is not liable, there is an end of the case; if the decision is the other way, and it is held that the defendant is liable, then arises and requires to be determined, the question of damages. Not upon a second hearing. All those questions are argued together to the Court; and they determine so many of them as is found to be necessary to the disposition of the case. The same remark applies to a great variety of cases. There are very few cases of any magnitude that turn necessarily and entirely upon one question. There are usually alternatives of decision. A multitude of points are argued, any one of which may be, in the judgment of the Court, decisive. This Case is no more than that, and provides for no more than that; and the language of these Articles is perfectly consistent with such construction, even though taken alone you might say it was not inconsistent with the other.—Taking a few words here, or a line there, you might say that is consistent with the other construction; but if there is any patent or latent ambiguity in the language that is employed in these articles, it is disposed of as far as the question of evidence is concerned, when you find that the only opportunity for putting in evidence at all on any question, is confined to the Case and to the Counter case. I admit that it is conceivable that you may hear this Case twice, that you may hear the five questions and decide them, and then hear the sixth, though the Treaty calls for no such thing, and the ordinary course of procedure precludes it. But that you shall hear it upon any other evidence than that which the case already discloses, is impossible, unless you adopt the alternative that you will hear it upon evidence which the Treaty furnishes no means of taking or submitting, and no possible means of reply to by the side against whom the evidence is produced. Our construction of the Treaty therefore is that the whole case is to be heard upon the evidence in the Case, and in the Counter case; and what the proper discrimination between the two is I shall have occasion to ask the attention of the Tribunal to hereafter.—But the hearing is to proceed upon the evidence that is already in the Case and the Counter Case, and there is no provision for, and no possibility of admitting further and future evidence of any kind under the strict provisions of this Treaty. This question is not new; I mean it is not new in the history of the Case. The United States, to begin with, never having conceived for a moment of any other construction as possible, and never dreaming that any such other construction would be set up, put in to its Case, its original Case, all its evidence upon every

point and particular. It was all printed, and went into the hands of the British Government at the time when the Case was delivered, on the 1st September, the time fixed in the Treaty.

Mr. Justice HARLAN.—It was due September 7th.

General FOSTER.—September 5th I think.

Mr. PHELPS.—It was some early day in September, and we conformed to the time imposed by the Treaty, whatever it was. It all went in, the evidence we stand upon today, except that which is contained in our Counter Case, which is strictly in reply to the evidence on the other side. We received at the same date the British Case, and, to our astonishment, not a word of evidence was brought forward in it upon any question in the Case, except the questions propounded as to the previous possession and occupation by Russia.

That is a question which we shall regard and treat as altogether subordinate. It depends chiefly upon documents; documents that are not new, which everybody had seen before. The British Case, therefore, contained nothing except a re-print of documents and papers relative to the old title asserted by Russia over the Behring sea, and the Treaties between Great Britain and Russia and Great Britain and the United States, and the correspondence that preceded and followed them. That is what they furnished us. I am reminded by Mr. Foster that there is something about damages in their case, but that is a small matter. On all the merits of the case, with which you will be called upon to deal, merits that cannot be approached, as I said yesterday, except on the basis of evidence, for they all rest on questions of fact, they gave us nothing at all. That was immediately made the subject of correspondence between the Governments, and on page 139 and following, as far as page 150 of the Counter Case of the United States, will be found that correspondence. I respectfully ask the Members of the Tribunal to peruse it. I am not justified in taking up the time to read it here; but I respectfully ask its perusal. The Government of the United States expressed its surprise that no evidence had been submitted on the part of Her Majesty's Government on any of the questions, which it was perfectly well known by long dispute and correspondence, were those on which this controversy turned, aside I mean from the Russion question. It remarked that, if it was the pleasure of Her Majesty's Government to submit these questions without evidence, their right to do so was undoubted. It was not for us to suggest what evidence they should put in, or that they should put in any; so that if we were informed by them that it was not designed to submit evidence, we had nothing further to say. We could not, however, believe that to be possible; and, therefore, we claimed that the Treaty required they should put it into their Case, as we had done, so as to give us an opportunity to meet it; otherwise we must go to trial upon their whole Case without any opportunity to reply to it by any evidence; and, as we pointed out, with a very scanty opportunity, if the evidence was contained in the Counter Case, even to deal with it in argument. Because the Counter Case was received as late as the 3rd of February; the first meeting of the Arbitrators was on the 23rd of February; we had to find our way across the Atlantic, and not only to make but to print and even translate, which involved printing twice, such written arguments as we desired to submit; so that not only were we deprived of the possibility of taking any evidence in reply, first because the Treaty did not admit of any evidence after the Counter Case, and secondly, because the time did not allow it. We had not even time to deal except very hastily in the written argument that is now before you,—with the evidence on the other side, we pointed out

also that the American Commissioners' Report was included, as it should have been, in our Case. The separate Report made to our Government by the American Commissioners was furnished, but the British Report was withheld. We pointed out in this letter the gross injustice of having a Report made up by the British Commissioners after having been furnished with the Report of the American Commissioners as the result of their joint investigation. Lord Rosebery was sufficiently struck with the force of those considerations to state, or we should not otherwise have known it, that the British Report had been prepared in point of fact and placed in the hands of their Government before our Case had been received, so that we were in error in supposing, what we were justified in supposing until we were otherwise informed, that the British Report was made up after inspection of ours. Then he conceded so much as this, that he furnished us at that time with a copy of the British Commissioners' Report, being willing to treat it as a part of their Case as we had offered, because in this communication we had said "If you will furnish your evidence now, we will accept it as part of the Case; the time is past—but we do not stand upon that." They sent us the British Report, stating that they would treat it, as we had proposed to do, as part of the Case; but he declined to accept the views of the United States Government as to the other questions.

Then the question arose what the Government of the United States should do, whether it should go on in the face of the assertion of the other side that it was proposed to put in their whole testimony when we could not answer it, nor even deal with it (except the British Commissioners' report), or whether the Arbitration should terminate then and there. The question may be asked why it was not terminated. That is not for me to answer. If I had been in control of the policy of the Government, instead merely of the conduct of this case, it would have terminated. I never would have consented to a proposition that seemed to me gross in its injustice and humiliating to the Government that submitted to it. In my opinion to go on upon such a proposal with a proceeding that professedly in its theory, in its object, was to dispose by friendly Arbitration of questions that had arisen between two nations, of whom neither had the right or desire to suppose that the other wished for anything but fair dealing and fair discussion, was not to be thought of. But wiser Counsels undoubtedly than mine prevailed and the Government of the United States decided to go on. They did not accept, acquiesce in, or agree to the theory of the British Government. In the last letter of Mr. Secretary Foster will be found stated with great clearness and precision the attitude of his Government.

I state the substance without taking up your time to read it. It was in effect that to revoke and stop the Arbitration was in the estimation of the Government calamitous. They thought perhaps that in receiving the British Report they had obtained most of the evidence on the other side, perhaps substantially all the evidence, and above all, that they would stand in the judgment of the Arbitrators at last as to what Evidence was legitimately before them under the provisions of this Treaty, and what was not.—And they were willing to trust themselves to the judgment of the Tribunal, and to reserve the objections which they still insisted upon to that mode of trial until the case had come to be heard.

Senator MORGAN.—Did the British Government protest against putting in the Report at the time?

Mr. PHELPS.—The British Government said, as you will perceive from the correspondence and the letter of Lord Rosebery, that they did not conceive that we were entitled to it, but as we had complained of the manner in which they had proceeded, they were willing to furnish it to us. They furnished it to us very much as we furnished to our friends on the other side the Report that was under discussion yesterday, not as a matter of right, but as a matter of favor.

Lord HANNEN.—A concession.

Mr. PHELPS.—Yes, a courtesy.

Senator MORGAN.—Was it furnished as constituting part of the Case.

Mr. PHELPS.—It was furnished to be received as a part of their Case. That is the way it was received, but in making it a part of their Case, they did not admit that they were obliged to do so, but that in view of the considerations we had presented as to its fairness, they consented to do it. If they had furnished their other evidence, there would have been no ground of complaint. The case went on, and on the 3rd of February we received the Counter Case which is before you, which you will perceive contains a great mass of evidence, of which the Report of the British Commissioners which we had previously seen was but a small part. A great amount of *ex parte* depositions—we do not complain of their being *ex parte*—ours are *ex parte*—that is the necessity of the case. But the fact that it was necessarily *ex parte* made it far more important that we should be furnished with it in time to reply. But the testimony is not only *ex parte*, but came to us on the same day that it came to you. We saw this testimony when you saw it, and we never saw it before. Then it became necessary for Counsel to determine what course to take. An obvious course was to apply to the Tribunal in advance of the hearing to strike out all the evidence upon the merits—all the evidence that should have been in the Case—I mean all that was not properly in reply to our Case. What would have been the consequence of that motion if we had made it? If the Tribunal had accepted our construction of the Treaty, and held that its Articles required that their evidence in chief should go into their Case, and that the Counter Case should be confined to evidence in reply, and had therefore stricken out the whole body of this evidence, that would be, of course, an end of the Arbitration. We could not expect that my learned friends would go on with this case if all their evidence was stricken out. We could not ask them to do it. If we had succeeded therefore in eliminating from this case all the evidence on the part of Her Majesty's Government, we should have brought the Arbitration to an end, because, as I have before remarked, there is no power in the Tribunal to enable them to replace it. It would have been only an indirect way of revoking the Arbitration, if we had prevailed by the decision of the Tribunal upon such a motion. We examined the evidence, and decided, unfair and unjust as it was, and much as we should have liked to reply to much of it, that we could sustain our case notwithstanding, and we would go on.

Now, upon the top of that, after our written argument is submitted, and when we rise to address the Court, a new batch of affidavits or depositions, or whatever they should be called, and a fresh report by these industrious gentlemen whose labors have pervaded the case from beginning to end, and whose conjectures and inferences and hearsay and everything else that they think proper to include, are made evidence by the Treaty, are proposed to be put in. What is the consistency of the position on the other side? They say that in their view all evidence bearing upon Regulations should be reserved till after the Award of the

Tribunal upon the previous five questions; that our evidence on the subject printed in our Case, is irregular, and should not have been put in at all; that they were not only justified but required to withhold theirs, and that it is we who are irregular as far as the question of Regulations is concerned. What is this evidence? What does it bear on? If it bears only on Regulations, why is it now offered on their theory? The time has not yet come for putting in any of it, if their construction is correct. Why is their Commissioners' Report, which is by the Treaty solely confined to the subject of Regulations—why is that in? In answer, it may be said, to our complaint. Then why is the rest of this evidence offered, if the time for it has not yet come? On the other hand, if it bears on the merits of the Case, and as these questions are inextricable, it does bear upon the merits of the Case, and you will find in the printed arguments of my learned friends that it is all relied upon all the way through on all questions, why was it not included in the Case where we could meet it? By this inconsistent construction which in its result is so unfair, they get into the case for all purposes through their Counter case, the body of their evidence, in such manner that we are entirely unable to reply to it by testimony in contradiction, impeachment, or explanation. The Tribunal will see the importance of this. They will see why we have felt justified, at a length that I fear has been wearisome, in discussing the construction of the Treaty on this all-important point. The United States Government point out in their correspondence that if they had dreamed of such a construction, they would not have entered into this Treaty. They need not have pointed it out. Is there a man who is *compos mentis* that would enter into a contract to try an important cause before any Tribunal, upon the terms that his adversary should hear and have possession of his evidence, and have an ample opportunity of replying to it, and that he should have no opportunity to meet the evidence that was brought against him? Is there a Court that ever sat that had any discretion on the subject that would permit such a thing to take place? Is it conceivable that the United States Government were so anxious to afford the world the example of an international Arbitration that they, understanding it, entered into an agreement to try this case upon those terms? Mr Blaine, who had ceased to be Secretary of State, and is now passed away, but under whose administration this Treaty had been negociated—one of the last acts—*the* last act, I am reminded, of his life that had reference to any official business, was to subscribe his name to the declaration that he never dreamed of such a construction, and that it never was suggested from the other side in the whole course of the proceedings. It was an unnecessary declaration, because to suppose the contrary would be to stultify the Secretary of State.

The PRESIDENT.—Is this opinion of Mr Blaine laid down in an official document which you mention.

Mr. PHELPS.—He had ceased to be Secretary of State, so that it would not be proper to describe it as an official document. It was furnished to the Secretary of State and transmitted to the British Government, and is printed in the correspondence to which I have just referred the Tribunal, and will be found in page 150.

The PRESIDENT.—Will you be kind enough to read it if it is not too long?

Mr. PHELPS.—It is from Mr. Blaine to Mr. Foster, November the 8th 1892. Mr. Foster was then Secretary of State: "After an arbitration had been resolved upon between the American and British Goverments, a special correspondence between the Department of State and Lord

Salisbury ensued, extending from early in July to the middle of November, 1891. The various subjects which were to be discussed, and the points which were to be decided, by the Arbitrators in the affair of the Behring sea were agreed upon in this correspondence. A month later Sir Julian Pauncefote, the British Minister, and myself arranged the correspondence and reduced the propositions to a Memorandum which was signed by us on the 18th December." (That sustains the remark in respect of the history of this Treaty that I made yesterday.) "Subsequently, the questions which had arisen between the two Governments concerning the jurisdictional rights of the United States in the waters of the Behring sea were expressed in the form of a Treaty concluded at Washington on the 29th February, 1892. This Treaty was confirmed by the Senate on the 29th March, 1892, ratified by the President on the 22nd April, ratifications exchanged on the 7th May, and proclaimed on the 9th May, 1892. In all these steps, including the correspondence with Lord Salisbury, the Memorandum concluded between Sir Julian and myself, and the Treaty that was ultimately proclaimed on the 9th May, 1892, and which was negotiated by Sir Julian and myself, not one word was said or intimated respecting the question now raised by the British Government as to a secondary submission of evidence after the first five points set forth in Article VI had been decided by the Arbitrators. It was never intimated that any other mode of proceeding should be had than that which is expressed in Articles III, IV and V of the Treaty." Articles III, IV and V of the Treaty are those which provided for the Case, the Counter Case, and the Argument. That is Mr. Blaine's statement. I will read, as the Book is before me, the concluding passages of Mr. Secretary Foster's last letter to Lord Rosebery in terminating this correspondence, and enclosing to him this paper signed by Mr. Blaine. He had argued this Case very fully and very clearly, as it seems to me, through this correspondence; and he concludes: "Having thus expressed the views entertained by the Government of the United States upon the argument of Lord Rosebery in support of his interpretation of the Treaty, it remains for me to add that I am instructed by the President to say that he appreciates the spirit of equity and liberality in which Lord Rosebery, while insisting upon his own interpretation, practically to some extent at least, and I hope fully, yields to the Government of the United States the benefit of its interpretation by furnishing to the latter the separate Report of Her Majesty's Commissioners, with the permission that the same be treated as part of the original Case on the part of Great Britain. If, as I believe and assume, this Report contains substantially all the matter which Her Majesty's Government will rely upon to support its contentions in respect to the nature and habits of fur-seals, and the modes of capturing them, I entertain a confident hope that all further difficulty upon the questions discussed in this note may be avoided. I deem it necessary, however, to say that the Government of the United States will, should occasion arise, firmly insist upon its interpretation of the Treaty, and that it reserves the right to protest against and oppose the submission to, and reception by the Arbitrators of any matter which may be inserted in the British Counter Case which may not be justified as relevant by way of reply to the Case of the United States."

The PRESIDENT.—That is previous to the Counter Case having been given over.

Mr. PHELPS.—Yes.

General FOSTER.—Three months before.

Mr. PHELPS.—Three months before, and as I remarked a little while ago, the Government were undoubtedly actuated in a large degree by the opinion assumed by Mr. Foster that in getting the British Commissioners' Report we had substantially the whole of the evidence, and that the question as to the submission of the evidence in chief in the British Counter Case, though important, was practically one nevertheless, that we might not find it necessary to insist upon. Then three months after comes the Counter Case which is before you, and we find ourselves, as might have been anticipated, in the dilemma I have stated. In asking you to reject the evidence it contains—and we believe we could make it very clear that it ought to be rejected—we should only be asking you to terminate the Arbitration at this late stage. We did not take this responsibility. And therefore we must undertake to go on and deal with this evidence in the best way we can.

These are the grounds, Sir, upon which we protest emphatically against the reception of this supplementary report or any other future evidence bearing upon the questions in this case that are to be determined by the Tribunal. It will be for the Tribunal to justify, if it is to be justified, the anticipation of the United States, that they might trust themselves without terminating this Treaty, as we should be completely warranted in doing, in the hands and the judgment of a Tribunal selected not to represent one party or another, but to do justice.

There is another objection to this Report to which I must briefly call attention. I have discussed it thus far as being a piece of evidence, just as I would have discussed it, had it been the deposition of a witness, and indeed, as I have said, a great deal of it is said to be made up of the depositions of witnesses.

Sir CHARLES RUSSELL.—That is not so.

Mr. PHELPS.—But there is a special objection in our apprehension in the reception of this document, even if other evidence were now admissible. If it were held that the case is open to the parties; and if it is open now, it would be open till the award is made, and evidence might be put in after the argument; if it were held that evidence is now admissible, this document is not admissible. This Report, with the extraordinary weight and quality which is conferred upon it by this Treaty, as a very cursory reference to the duties of this Commission will show, should not be received.

You will excuse me perhaps for reading again what has been read several times, namely Article 9, because it has not been read with a view to this point. "The High Contracting Parties having agreed to appoint two Commissioners on the part of each Government to make the joint investigation and Report contemplated in the preceding Article VII, and to include the terms of the said Agreement in the present Convention, to the end that the joint and several Reports and recommendations of said Commissioners may be in due form submitted to the Arbitrators, should the contingency therefor arise, the said Agreement is accordingly herein included as follows: Each Government shall appoint two Commissioners to investigate,"—how? "*Conjointly* with the Commissioners of the other Government, all the facts having relation to seal-life in Behring's Sea, and the measures necessary for its proper protection and preservation. The four Commissioners shall, so far as they may be able to agree, make a joint Report to each of the two Governments, and they shall also report, either jointly or severally",—even in the event of disagreeing they are still authorised to report jointly, though not required to do so,—"to each Government on any points upon which they may be unable to agree. These Reports shall

not be made public", and so forth. The investigation was to be a joint investigation. It was not the absurd provision of the Government creating by Treaty what each might have created for itself without Treaty, — an *ex parte* mission to Alaska to prepare its Case. It was not a provision that each Government should send two attorneys up to Alaska to gather evidence on its side, leaving the other side to take care of itself in the same way or in any other way it thought proper. That needed no Treaty. It was to appoint Commissioners, whose position corresponded to your own, to investigate jointly for the benefit of both Governments the main facts underlying the questions in dispute; to report jointly if they agreed, and jointly if they chose if they were unable to agree, or severally; and then it was provided most properly that the conclusions and recommendations and discoveries of such a joint Tribunal, I may almost call them, — a Commission joint in its character, in which both Governments were represented—that those should be laid before the subsequent Tribunal, if it became necessary to have a subsequent Tribunal. It is most proper that they should be laid before you, but the force they are likely to have when they come before you will very likely depend upon the judgment of the Arbitrators as to how far they are or are not in compliance with the letter and the spirit of the Treaty.

Now, the function of those Commissioners was exhausted when these Reports were made, as far as the other Government was concerned. They became *functi officio* when they made their reports and submitted them. There is no provision in the Treaty and no contemplation, that half the Board after that, without the knowledge or concurrence of the other half, should either make another expedition up to Alaska or should sit down in London and make an investigation, and make a large body of evidence and a new Report on those questions, and that, at a late stage of the Case, that should come in and be laid before you as evidence. The whole spirit of the Treaty rebuts and repudiates any such idea as that. What they chose to do for their own Government after that is no affair of ours. They may make as many Reports and investigations for their own Government, if their Government choose to employ them to do so, as they like.

Mr. Justice HARLAN.—Do you know when the investigation was made upon which this supplemental Report was based?

Mr. PHELPS.—No better than Your Honor knows. I know nothing at all about it. We never heard of this supplemental Report till the same time that you did.

Sir CHARLES RUSSELL.—I beg you pardon; you had notice in the Counter Case that we should present such, but only on the question of Regulations, not on the incidents of seal-life.

Mr. PHELPS.—I never read it. It is undoubtedly there if my learned friend says so; but it never attracted my attention.

Mr. Justice HARLAN.—What you mean is, that the document was not seen by you?

Senator MORGAN.—It must have been in existence when the Counter Case was handed in, if an allusion is made to it in the Counter Case.

Lord HANNEN.—It is only reserving a right to present it in future.

Senator MORGAN.—I spoke of the existence of the Report. It must have been in existence at the time that the Counter Case was delivered.

Sir CHARLES RUSSELL.—When the time comes, I will explain it exactly.

Mr. PHELPS.—There is a great deal more to be said about these Reports; but not now. That arises on the merits of the Case, and I do

not intrude them on this question, which is only as to the admissibility of this one.

Now, I say that the Treaty does not warrant it. I should have said that, in pursuance of this provision, the United States threw those Islands open to this Commission, furnished vessels, and extended every possible facility. They went there together,—the four Commissioners, as they should have done. They went at the same time; but they declined the offer of the United States to furnish the same vessel, Mr. Foster reminds me; so that they went on their expedition, and our Commissioners made their Report, but the Islands were thrown open either to themselves or with us. Then comes a Report which will engage your attention at the proper time; and now comes this proposition, that after this is all over without any new investigation, for it will not be pretended that they have been up there again, I think,—at a late stage in the case they can sit down and make a new document which shall become evidence in the Case? It would not be evidence, a large part of it, if it come in at any time, if it is not invested with that character by the Treaty, and, unless it comes in according to the terms of the Treaty, it does not acquire that character. I insist, therefore, in respect to this document that, aside from the general objection to the admission of any evidence at all, at this stage this is especially obnoxious because it is an attempt to exercise functions by the Commissioners that had been exhausted under the terms of the Treaty by their previous Report. Lord Rosebery was struck, as I have said, when Mr. Foster pointed out to him these Reports that were to be the result of a joint investigation and perhaps a joint Report.—"We have given you ours; yours is to be made up in reply to ours."—"Oh! no," said Lord Rosebery, "that is not so. Our Report was completed, and in the hands of Her Majesty's Government on such a day"—some date in June, I think,—"so that you are in error in supposing that the British Commissioners have availed themselves of the chance of examining your Report before they made theirs." And he furnishes the Report. How is it now? Are these men parties to this cause? Have they a perpetual right to be heard, and, when their conclusions are refuted by evidence, to come in and swear over again or report over again, which is the same thing in its effect, and gather more testimony and more hearsay and conjecture and suspicion, until the thousand tongues of rumour are exhausted, and still make it evidence.

There is only one other point, and it is the last remark, I have to trouble you with. One other ground for the admission of this evidence was stated by the Agent of Her Majesty's Government in the communication to the Agent of the United States Government, which accompanied, I believe, the notice of this Report, that he thought the Tribunal would be glad of any "trustworthy" information that would aid them to determine the questions before them. "Trustworthy" in the estimation of Her Majesty's Government is *ex parte* testimony which has been concealed from the other side and no possibility of reply allowed! Is that trustworthy information? Through what back door of the Tribunal is it expected that such evidence would make its appearance in Court if it made its appearance at all? Trustworthy? If the Treaty does not quite admit it, you must really accept it, because it is so "trustworthy"! I cannot add anything to the force of that adjective, and I will not try. How far we are entitled to comment upon the evidence in the Counter Case that has thus come in against our protest, and as we say utterly out of order will come up hereafter. We are now engaged only in protesting that this addition should not be made to it.

Sir CHARLES RUSSELL.—Does any body add anything?

Mr. CARTER.—I designed to close the discussion, but I desire brevity and I shall not offer anything further at this point.

The PRESIDENT.—I call your attention to the fact that we have only half an hour before the interruption of our meeting.

Sir CHARLES RUSSELL.—I cannot conclude in that time.

The PRESIDENT.—I dare say not. I mention the fact beforehand in order that you may dispose your argument in consequence.

Sir CHARLES RUSSELL.—If you please, Sir.

When, Sir, we received the Notice of motion which the representatives of the United States thought proper to send intimating their intention to make the application which has been put forward by my learned friend we anticipated a discussion which would have been of a legal character. In other words, we anticipated a discussion upon what was the true interpretation of the Treaty under which and under which alone this Tribunal derives its authority, and we certainly did not anticipate that this would have been made the occasion of importing into the discussion the heat, the extraordinary heat, that my learned friend has manifested, and still less did we anticipate that it would have been made the occasion for flinging very broad, very wild, and, as I shall hope to demonstrate, utterly unfounded suggestions of attempted injustice on the part of Her Majesty's Government.

Mr. PHELPS.—I did not mean to say that, Sir Charles. I meant to say that the result was injustice.

Sir CHARLES RUSSELL.—Well I am glad to have given the opportunity, at all events, for a disclaimer of something which certainly was conveyed, in our apprehension, by some things that my learned friend has said. My learned friend has made these high sounding appeals to justice and has told us that there can be no justice of judgment unless there is justice of procedure, what is that—(my learned friend will not suppose I mean to be offensive in saying it)—but a neatly dressed platitude? This Tribunal is, I admit,—nay, it is part of our Case,—governed—governed absolutely—by this Treaty, I begin by making the admission, that if, according to the true construction of that Treaty, we are not entitled to use and to refer to what has been called the Supplementary Report, we will bow to the judgment of this Tribunal as a matter of course. But I hope to make it apparent, not I will say to a majority only of this Tribunal, but I hope to make it apparent to each individual member of this Tribunal that we are perfectly within our rights according to this Treaty in the course that we have pursued and in claiming admissibility for the document in question. Now I shall best express the condensed sense of the argument which I have to address to you by reading, as I know it is the desire of the Tribunal that I should read, our short answer to the contention on the other side, which has been reduced into writing, and which, as I think the President desired in the previous Case, should be handed in to those who have charge of the record of our proceedings. We submit "that the supplementary report of the British Commissioners dated the 31st January 1893 presented solely with reference to the question of Regulations and under the provisions of the Treaty of Arbitration of the 29th of February 1892 is properly presented to the Tribunal and should be considered by them in the event of their being called upon to determine pursuant to Article VII what if any concurrent Regulations are necessary." Now, Sir, you will observe that puts in the fore ground a point obscured in the argument of my learned friend it puts in the fore ground the fact that this Supplementary Report is not conversant with,

does not pretend to deal with, is not intended to be used in relation to any of the questions of right raised in this Arbitration, and this brings me to the very heart of this contention. This brings me to, in fact, the point which alone can supply any justification for the grave importance which my friends have sought to attach to this discussion. What is that point. What is the heart of this mystery. It is this. That my learned friends desire that this Tribunal should deal with all the questions embraced within the purview of this Treaty as if they were but one question, that this Tribunal shall be able to mix up and to consider in the same range of thought and argument two classes of questions which are distinct in themselves and are made distinct beyond any question in the Treaty. And therefore the first point to which I desire to address myself is to make it apparent, because it is the foundation upon which my whole argument rests that not only are there two sets of questions, or two divisions of questions, I should prefer to say, differing in their nature and as to which different considerations as to evidence apply, but that this division marks out a further division of the functions of this Tribunal itself in the consideration of those two divisions.

Now you have before you, Sir, copies of the articles of the Treaty, and I will not trouble you by more than a passing notice of articles III, IV, and V, which deal with the presentation of the Case, on each side and which in Article V contemplates, not as a matter of grace or favor, as my learned friend seemed at one moment to suggest, but as a matter of right, oral argument before these Arbitrators upon the questions involved; and then machinery having been provided in those Articles III, IV, and V, for the presentation of the Case on each side, by Case Counter Case and Argument, Article VI proceeds to set out five points which may be shortly described by me—I think correctly described,—as claims of right upon the part of the United States in relation to the subject matter in controversy; and not of right merely, but of exclusive right. The first question is the exclusive jurisdiction claimed in the Behring sea, and the exclusive rights in the seal fisheries which it is alleged were asserted and exercised by Russia. That point being made on the part of the United States, in order to support what is put forward more or less seriously—very seriously indeed in the diplomatic correspondence which led to the Treaty, but which, if I may judge from the arguments presented, and the Counter Case of the United States, is now going to take what my learned friend euphemistically called a subordinate place in the arguement—the second question is "How far were these claims of jurisdiction as to the seal fisheries"—"of jurisdiction", that is to say these exclusive claims, "as to seal fisheries recognized and conceded by Great Britain". Need I do more than point out in passing to the Jurists whom I am addressing that upon that allegation was intended to be asserted a claim by the United States based upon long user, acquiescence, and recognition of certain supposed rights, so that Great Britain was to be excluded from the consideration of those laws which regulate territorial jurisdiction and cognate rights, and was in the language of lawyers to be estopped, to be prevented from saying that these rights so recognized had no legal foundation or support in International Law at all.

The third question is subsidiary to these: "Was the body of water now known as the Behring's sea included in the phrase 'Pacific Ocean', as used in the Treaty of 1825 between Great Britain and Russia, and what rights, if any, in the Behring's sea were held, and exclusively exercised by Russia, after said Treaty". Again a question of right.

Allegation on the part of Great Britain that, whatever may have been the antecedent state of things, that passed away and was removed by the Treaty of 1825, because the Treaty of 1825, according to the contention of Great Britain, gave in express terms rights of fishing amongst other rights—I should have said it recognized—not gave, but recognized rights of fishing, amongst other rights in the Pacific Ocean, which was a comprehensive phrase, intended to include the Behring sea. No, said the United States, the Behring sea was left, and left designedly out of the Treaty, and whatever rights Russia claimed and exercised to Behring sea were left untouched by that Treaty. But now, according to my learned friend, this has become a subordinate question. He has referred to that distinguished man now passed away, a man whose ability both Hemispheres have recognized and acknowledged, some of whose able communications and arguments upon this matter I shall have to consider at a later stage of this discussion. But what did he say upon this question? Writing on the 17th December 1890. I am referring to page 263 of the Appendix to the Case of the United States, Volume I—he wrote in this language:—"Legal and diplomatic questions, apparently complicated, are often found, after prolonged discussion, to depend on the settlement of a single point. Such, in the judgment of the President, is the position in which the United States and Great Britain find themselves in the pending controversy, touching the true construction of the Russo-American and Anglo-Russian Treaties of 1824 and 1825;" and then, after dwelling upon that for a moment he goes on, "If Great Britain can maintain her position that the Behring sea at the time of the Treaties with Russia of 1824 and 1825 was included in the Pacific Ocean the Government of the United States has no well grounded complaint against her;" and yet we are now told by my learned friend that the importance of this question is receding into the background and is, after all, only a subordinate question. Why it suits the exigencies of the discussion of my learned friend to assume that position will become apparent when it is more germane to the matter in hand to enlarge, as I must at a later stage enlarge, upon this branch of the argument and of the controversy. What is the next question? Did not all the rights of Russia as to jurisdiction and so on, pass by the cession of 1867 when, as you know, the United States of America acquired by cession of that year 1867, the district of Alaska and the rights properly incident to the territorial cession of that country—again supporting their derivative title? Finally. "Has the United States any right, and, if so, what right of protection or property in the fur seals frequenting the Islands of the United States in Behring sea when such seals are found outside the ordinary three mile limit?"

Now I have read these questions, I would submit,—and I appeal to the judgment of any single Arbitrator who hears me—and I do not understand my learned friend even to suggest the contrary—that every one of those questions depends upon right. As I say, I do not understand that to be disputed. But what follows from that? Why not only that there is a distinction as to the character of the questions, but that this distinction involves—necessarily involves—a distinction in the functions which this Tribunal have to exercise in relation to those questions, if there be found also in the Treaty questions which do not depend upon right. What is that distinction? Well, it is clear. You are a distinguished body of Jurists. You are chosen because you are so. You are here not to make the law, not to declare what the law ought to be, but you are to adjudicate upon questions of right *as the*

law is. In other words, in this respect, your functions are distinctly, absolutely, solely, the functions of Judges and of Jurists.

But I pass from those questions, and I have to show if I can that the Treaty contemplates by this Tribunal the settlement of other questions which are not dependent upon right, which are not dependent upon the assertion of exclusive right; but you are asked (the questions of right being decided), to apply your minds as an impartial Tribunal, and representing not one side but both, recognizing the fact that there are other rights than the rights of the United States and other rights than the rights of Great Britain, to determine what regulations are necessary for the proper protection and preservation of the fur seal. You are then dealing with an area of the open sea in which the rights of mankind are common and you are asked, *in the interests of all to say what would be the just, the necessary, the proper regulations addressed to the object,* the *main object, of this Arbitration, the preservation of the fur seal.*

Senator MORGAN.—*Does the learned Counsel insist that that is a judicial function on our part?*

Sir CHARLES RUSSELL.—*Not at all.* I am glad that the Member of the Tribunal who has addressed me *is recognizing the distinction that I am drawing. No.* When you get to that part of the Case, *you will have to do what in the interest of all concerned is expedient. You have to stand between these parties who are in controversy, recollecting that each of them has a right which must be regarded and borne in mind and that outside the immediate parties to the controversy there are others who have rights as a part of mankind.*

Senator MORGAN.—In that view, if I understand the Counsel, *we have something to ordain in that particular view of the case, and not anything to adjudicate.*

Sir CHARLES RUSSELL.—You have *to recommend* and *to recommend with authority.*

Senator MORGAN.—"*Determine*" is the language.

Sir CHARLES RUSSELL.—Yes, determine.

Lord HANNEN.—"*Determine*".

Sir CHARLES RUSSELL.—*Determine I agree that is what you have to do; and without pledging myself for the moment to the acceptance or the non-acceptance of the word "ordain" as distinguished from the word "determine", as distinguished from the word "adjudicate" which possibly is correct.*—I can convey my meaning, I think, intelligibly; you have, under the first head, to deal as Judges and Jurists, under the second head, you have to deal as just men ordaining a set of rules which the parties have left to your determination and which you are asked to determine in view of all the interests affected. That I take to be the grave distinction.

Well then in what order is this question to come before you. If my learned friends are right or my learned friend Mr. Phelps is right in his contention, there is no reason why he should not begin at what I would call the wrong end of this discussion—why he should not say "Well, I have already gone the length of admitting that these questions of right are gradually receding into the background, I do not attach importance to them. I will ask the Tribunal to begin with the Regulations"! Could he do so?

Mr. Justice HARLAN.—What I wish to ask just here is whether, in your use of the word rights you are referring to the rights that may be involved in the answers to the first four questions, or do you embrace also the rights involved in Question 5?

Sir CHARLES RUSSELL.—Unmistakably Question 5,—unmistakably, beyond any possibility of argument whatever, yes, and the contrary has not even been suggested in argument by my learned friend Mr. Phelps; absolutely.

Senator MORGAN.—If the learned Counsel will indulge me for a moment I wish to call attention to the first question under Article 6, "What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?" The point I wish to call the attention of Counsel to is *whether the "assertion and exercise prior"* to that period by Russia is not the proposition that we have to answer instead of the rightfulness of the exercise and assertion.

Sir CHARLES RUSSELL.—*I think both;* either would be enough for my purpose, but I think both. But now I follow the question addressed to me by another member of the Tribunal and I would desire to give a little fuller answer to it. How are these questions introduced? I was putting to myself the question whether it would be competent to the Representatives of the United States to say. "We will dispence with all those questions 1, 2, 3, 4 and 5. We will ask the Tribunal straight away to come to the question of Regulations under Article VII". Would it be within their competence to ask it. Would it be within the competence of this Tribunal to yield to that request. I say emphatically no, because Article VI begins by saying: "In deciding the matters submitted to the Arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of the said five points". Therefore the decision of the Tribunal upon each of those five points cannot be dispensed with, but what is the order of the decision. Could they decide the question of Regulations first and then proceed to the question of right? No, because Article VII provides this. I need not say that any interpretation points to a contingency. "If the determination of the foregoing questions as to the exclusive jurisdiction" you observe "of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to the Behring sea". What is to follow? "the Arbitrators shall then determine" that is to say if the contingency happens, then, but not till then, "the Arbitrators shall determine what concurrent Regulations outside the jurisdictional limits of the respective governments are necessary and over what waters such Regulations should extend".

I think therefore that I have so far made good my position—I ought not to say that I think so, as it is not the habit of Counsel, with us at least, to express personal opinion and I wish to guard myself and desire to follow the course which is considered the proper course in these matters to submit these matters, and let them be tested by the strength of the arguments advanced in support of them without bringing in, and I hope my learned friends will agree with me, the personality of Counsel as a warrant for or against. I am quite sure that there are many propositions put forward in the argument which I have had the pleasure of reading presented by the United States which I should be sorry to be, and I think my friends would be sorry themselves to be committed to as approving Lawyers.

The contingency is, therefore, that if it shall be found that the matter stands in such a condition of things that there is not the exclusive

right peculiarly appertaining to the United States, which is suggested either under an inherent or under a derivative title, then the question of Regulations is to arise. I now think this the convenient moment for supplementing the further answer to the question which one of the Tribunal was good enough to address to me as to Question 5. The only difference between Question 5 and the preceding Questions is this. Both relate to questions of right; both are based upon allegations of right on the part of the United States. The only difference is that whereas the Questions 1, 2, 3 and 4 are based upon what I may call the derivative title under Russia and upon the allegation of acquiescence of Great Britain, Question 5 asserts those rights of protection and of property as inherent in the United States itself by virtue of its territory and rights inherent in itself, exclusive of others. That is the only difference. In other words, Question 5 points to rights of an exclusive kind belonging to the United States by reason of its inherent powers as territorial owners; Questions 1, 2, 3 and 4 are conversant with the allegation of rights of the same kind but based upon a derivative title from Russia, a title which they allege to have been recognised by Great Britain.

Now, I claim, therefore, to have made good, so far, the position with which I set out.

Mr. Justice HARLAN.—In order that I may get your idea exactly, will you tell me, is it your contention that the arbitrators could not determine the question named in the first two lines of Article VII as to the exclusive jurisdiction of the United States without also determining the question of the right of property in Question 5.

Sir CHARLES RUSSELL.—I think, Sir, I must ask you to be good enough to repeat that question, and, if you could, in a little louder voice?

Mr. Justice HARLAN.—Is it your position, which I want to understand fully, that the arbitrators could not determine the question in the forefront of Article VII as to the exclusive jurisdiction of the United States without determining also the question of the right of property named in Question 5?

Sir CHARLES RUSSELL.—No, I say that is involved. I have already answered that in the answer that I have already given to you.

Mr. Justice HARLAN.—Yes.

Sir CHARLES RUSSELL.—You will observe, Sir, that the thing is clear. "If the determination of the foregoing questions," you will observe, the argument is clear and I beg to point out that it would have been very convenient, if this idea was passing through your mind or through the mind of any member of the Tribunal, if my learned friends themselves had been asked about it, because my learned friend (and therein I think he was perfectly right) did not seek to draw any distinction such as is suggested in the question, nor indeed could he as I submit. The first words of Article VII are. "If the determination of the foregoing questions as to the exclusive jurisdiction of the United States." It draws no distinction between Question 5, and Questions 1, 2, 3 and 4. It deals with the foregoing Questions. The foregoing Questions are Questions 1, 2, 3, 4 and 5. That is my answer.

But now, Sir, I proceed.

The PRESIDENT.—I would rather that we broke off here if you are going to begin a new part of your argument.

Sir CHARLES RUSSELL.—If you please.

[The Tribunal then adjourned for a short time.]

Sir CHARLES RUSSELL.—Sir, so far I have dealt only with the clear and marked divisions of the questions and the clear and marked distinction as to the functions which this Tribunal is called upon to exercise in relation to that marked division of the question. So far I have said nothing about the Commissioners. It will be apparent to the Tribunal that the reference to the Commissioners appears in the Treaty in an inverted order. That is to say that Article VII refers to the part, so to speak, that their opponents are to play in the controversy when it becomes a question of Regulations before the Tribunal whereas it is in Article IX that we find the constitution of the Commission itself; and therefore, with the assent of the Tribunal, I would refer to Article IX first as being, I think, in the more natural order.

Article IX provides that:

> The High Contracting Parties have agreed to appoint two Commissioners on the part of each Government to make the joint investigation and report contemplated in the preceding Article VII and to include the terms of the said agreement in the present Convention to the end that the joint and several reports and recommendations of the said Commissioners may be.

Not "shall be" but "may be":—"In due form submitted to the Arbitrators, should the contingency therefor arise."

Thereupon it proceeds: "That each Government is to appoint two Commissioners to investigate conjointly." And further:

> The four Commissioners shall, so far as they may be able to agree, make a joint report to each of the two Governments, and they shall also Report either jointly or severally to each Government, on any points upon which they may be unable to agree.

Then follows the provision that they are not to be made public until submitted to the Arbitrators, or until it shall appear that the contingency of their being used by the Arbitrators cannot arise.

Now, first, it is clear from Article IX, and still more clear from Article VII that the functions of the Commissioners have relation, and relation solely, to the question of Regulations. Now, is that in dispute? I do not think it can be disputed. I do not understand my friend Mr. Phelps to have suggested the contrary.

Mr. CARTER.—I do not know that Sir Charles expects an answer to that.

Sir CHARLES RUSSELL.—Merely yes or no. I anticipated rightly that there was no contention about that.

Mr. CARTER.—There is; we shall not agree to that.

Sir CHARLES RUSSELL.—I beg your pardon. I understood you to agree. Now, I understand it to be suggested that the Commissioners reports have relation to other matters than the matter of Regulations. That is what I understand.

Mr. CARTER.—They relate to everything that they are pertinent for.

Sir CHARLES RUSSELL.—Yes; but the point is what are they pertinent for? To that I get no answer. Either the functions of the Commissioners relate to Regulations, or they do not. What is the position that the States Counsel take. In certainly understood—I may have been wrong, of course I should not seek to bind my friend Mr. Carter by any statement that my friend Mr. Phelps made;—but my friend Mr. Phelps in distinct terms said that this was the ordinary case in which one question being submitted one way, other questions might, become unnecessary to consider at all: therefore, if the first five questions were decided one way, the question of Regulations might become wholly immaterial. But I do not seek to rely upon any admission, qualified or absolute. I rely upon the Treaty itself. What is the matter to which

these reports, to use my friend Mr. Carter's slightly dubious expression, are pertinent? This at least is clear, that Article IX contemplates a contingency in which their reports shall not be used. So far, I think, we agree.

Then what is the function that the report is to play and in reference to what questions? For that we have to look to Article VII:

> If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary.

Then the Arbitrators shall determine that question.

"To aid them in that determination, a report of a Joint Commission, to be appointed by the respective Governments shall be laid before them"—the next phrase I will leave till a later period of my argument—"with such other evidence as either Government may submit."

It really passes my humble capacity to see what is to be said in answer to the proposition which I respectfully affirm and submit, that Articles VII and IX make that clear to demonstration which, up to this moment, I did not think was even in controversy between us, that the appointment of the Commissioners, to begin with, and the report of the Commissioners consequent upon their appointment, was to serve one purpose and one purpose only—to aid the arbitrators, should the contingency arise, in determining the regulations which they are to ordain.

I am a little surprised that there should be any doubt about that. I cannot think there is any real doubt in the mind of any one of the Tribunal whom I am now addressing. But of course I go further than that—much further than that. I say that Article VII shows, and shows for a very good reason, that when you come to the question of Regulations you are following and observing an order quite distinct from that which you are observing when you are dealing with the question of right, because you have got what might be called self-contained provisions in Article VII, showing what the Tribunal may have regard to in the consideration of the question of Regulations. What is that? They are to be aided by the Report of the Commissioners; and what else? "And this report shall be laid before them with such other evidence as either Government may submit."

Really one has a difficulty in knowing what is the construction put opposite to this. My friend, Mr. Phelps, says that the fallacy in our constructions depends upon the misconstruction which we place upon the word "contingency" in Article IX; and I agree—for I wish to come to close quarters upon the question—that if my friend's construction, of that word "contingency" in Article IX is the correct one, he has advanced a long way in the support of his argument; but equally by contrary if his construction is the erroneous one it is fatal to his argument.

Now, the first thing to be observed is this: That the word "contingency" occurs twice in Article IX. It occurs in the first clause; it occurs in the later clause. Is it to be believed that it occurs in those two clauses in a different sense and that the same word used in the same article has one meaning in one part of that Article and another meaning in another part? No, I do not think that will be urged; but I am not asking for an answer. I do not think that will be urged; but what is its meaning in the position in which it first appears?

I think, before I submit what the Tribunal has of course already anticipated, as to the meaning which we attribute to it, it is best to see what my friend, Mr. Phelps, says about it. I am reading from the print of the shorthand note of the argument yesterday evening, at page 47

of the print, at the end of the second large clause, about the middle of the page: "These reports, says the Treaty, shall not be made public they shall be submitted to the Arbitrators or it shall be considered".

That the contingency of their being used by the Arbitrators cannot arise. It is said that that contingency refers to the contingency of the decision.

"It is said" ought also to precede the next sentence.

"It is said the contingency is, whether the Arbitrators shall decide in favor of or against the claims of right which the United States Government have set up. We regard that as altogether erroneous. It is the contingency of the Arbitration itself—the contingency of there being any arbitration, not the contingency of the decision on the previous questions that the Arbitration shall reach, if it takes place".

That meaning is sufficiently obvious; but it is made clearer if the Tribunal will refer to page 50, the last sentence but two at the bottom of the page. You will observe, sir, the sentence beginning "Does it refer".

"Does it refer, as my learned friend will contend, to the contingency of the Tribunal deciding against the United States on the five questions that are first propounded, or does it refer to the contingency of there being any arbitration at all?"

That is it say, those who argue on behalf of the Government of the Queen contend that it depends on the contingency of the decision in a particular way of the five questions. "I", says Mr. Phelps, representing the United States, "contend that the contingency referred to is the contingency of there being any arbitration at all". The issue is therefore clearly joined between us. My learned friend has stated with great clearness, what he means is the construction. He adopts one construction; we adopt the other.

And finally, the last reference I shall trouble you with, Sir, is the last paragraph but one on page 51, of the short hand reports where there is an interruption by one of the Tribunal putting a question. My friend has concluded the sentence which ends, or begins a paragraph, I am not sure which:

"If the Commissioners agreed, there would be no occasion for any Arbitration."

This is still following out the idea that the contingency twice referred to in Article IX referred to the contingency of there being no Arbitration at all.

"If the Commissioners agree," says Mr. Phelps, "there would be no occasion for any arbitration". Then Lord Hannen asks the question.

"Where is that embodied in the Treaty? Is it anywhere embodied in the Treaty, that if the Commissioners agreed the Arbitration would not go on?"

This is a very pertinent matter. My learned friend's answer is.

"No, your Lordship, it is not."

Now, therefore, the question is the question that is decisive in this matter, as it seems we both think.—What is the meaning of the word "contingency" in Article IX?

Now, let me guard myself upon one matter of construction. This is a question of the construction of the Treaty; and although I do not deny that on points where the Treaty is ambiguous it may be, and has been so regarded by previous tribunals constituted like this, admissible to refer to the negotiations which led up to the Treaty, in order to define the subject matter of the Treaty, the subject-matter referred to the tribunal, etc., I deny that where the Treaty itself is clear and unam-

biguous, that the reference to what Lord Salisbury may have thought or said or written in his Cabinet, the question of the Treaty being a matter of royal prerogative and therefore of executive action in Great Britain, can be invoked in the construction of the Treaty; and equally we know that by the Constitution of the United States the head of the executive there cannot bind the country by a Treaty, but that it must be a matter approved by the Senate or approved by a certain proportion of the Senate. Agreed; but we have no more to do with discussions in Senate or out of Senate, or as to what influenced this Senator or that Senator in the view that he took in giving his vote for or against the affirmation of the treaty than we have to do with the thoughts, opinions, writings, sayings of Lord Salisbury discussing the matter with his colleagues or conveying his views by diplomatic correspondence to the representatives of the Crown in foreign countries.

Then is this clear? Is it a matter of doubt what this "contingency" means? Let us see the connection in which it is used:

"The Contracting Parties have agreed to appoint two Commissioners to report on the part of each Government to make the joint investigation and to the end that the joint and several reports and recommendations—"

Can it be supposed that the recommendations had anything to do with the question of decision and legal right?

"of said Commissioners may be in due form—"

What?

"submitted to the Arbitrators, should the contingency therefor arise."

It is not submitted to a tribunal of arbitration *ex post facto* to be constituted, but it is submitted to the Tribunal which by this Treaty is constituted; and therefore to suggest that it was in the contemplation of the parties to this Treaty that the contingency referred to, as to there being arbitration at all, cannot be supported with any show of reason whatever. The Tribunal is constituted by this Article.

But is there anything further to make that clear? If my friend is right in his contention, it follows that it was also contemplated that if the Commissioners should agree in their report—and that is what my learned friend does not shrink from saying—that if the Commissioners should agree in their report, there is to be no arbitration at all. There are two answers to that. The first answer is that which you will already have gathered from my argument on another point; namely: that the Commissioners had nothing to do with the questions of right, and that Article VI expressly stipulates that there shall be a distinct decision by the Arbitrators upon those five questions. That is answer number one.

Answer number two, equally clear and equally conclusive: That if the Commissioners had agreed in their report, and had agreed in their recommendation, not only does this Treaty not make it obligatory upon the Arbitrators to accept and act upon that report, but it in express terms shows what was to be the relation of that report to their consideration, and to their decisions on the question of regulations. Article VII has in express terms said that the report of the Commissioners was not to rule them, was not to be a matter which they were to adopt as a matter of course, without exercising their own judgment upon it, but was a matter to aid them in their determination upon the question of regulations.

Therefore my answers, as I submit, are clear and complete. It was not the contingency of there being an arbitration at all, for the two reasons I have given, which I hope I have made intelligible to the Tribunal, and which I do not desire to repeat.

The contingency was the contingency of the five questions being decided in the fashion which should render the concurrence of Great Britain necessary. That was the contingency contemplated in the first, as it was the contingency contemplated in the last part of Article IX.

Indeed, the latter connection in which the word "contingency" is used even more strongly makes the force of this contention which I am submitting apparent, because the words are: "These reports shall not be made public until they shall be submitted to the Arbitrators, or (until again understood) it shall appear that the contingency of their being used by the Arbitrators cannot arise." Not the contingency of there being an arbitration, which arbitration by the preceding provisions is already constituted.

If it had not been for the introduction of certain other topics, I should, Sir, have felt myself justified in sitting down; but I suppose that I ought to refer to the other topics that have been dealt with by my learned friend.

Let me, however before I leave these Articles, make some reference to a very—if I may respectfully say so—acute comment thrown out by one of the members of the Tribunal, a comment which I confess seems to me, as far as I can judge, to be well founded in one particular. I understood that comment to amount to this—I do not regard it as the judgment even of the individual member of the Tribunal; but I understood it to mean; that the report contemplated by Articles VII and IX, to be a report within the meaning of those Articles, ought to be a report which might turn out to be a joint or a several report, but which whether a joint or a several report, *should be founded upon a joint investigation. I understood that to be the suggestion.*

Senator MORGAN.—I intended to put that as an inquiry.

Sir CHARLES RUSSELL.—*I am not at all sure that that is not perfectly sound.* I am not at all sure *that when we come to examine these reports of the Commissioners on both sides it will not be found that they will not stand the test;* and that applies equally to the reports of the Commissioners on the part of the United States and to the reports of the Commissioners representing or appointed by Great Britain.

Mr. Justice HARLAN.—I suppose you are familiar with the report now being talked of—the supplemental report?

Sir CHARLES RUSSELL.—Yes.

Mr. Justice HARLAN.—Can you tell us—for we have not yet had it before us officially—whether it is a separate report, based upon the joint investigation that was made in 1891, or is it a report based upon a subsequent independent investigation in which both Commissioners participated?

Sir CHARLES RUSSELL.—As far as I can judge, partly on one, and partly on the other. My learned friend said that he had not read the report; and indeed in the letter by which the United States Agent, my friend Mr. Foster returned the report, it was stated that it was unread. That being so, my learned friend Mr. Phelps said that somebody or other who I do not know, has told him that it contains a number of new depositions. All I can say is that it is not an accurate description of it.

Lord HANNEN.—Sir Charles, will you allow me to call your attention to a passage in the seventh Article which I do not think you have commented upon? What construction and effect do you give to those last words "with such other evidence as either Government may submit"?

Sir CHARLES RUSSELL.—I am coming to that, sir.

Lord HANNEN.—I beg your pardon.

Sir CHARLES RUSSELL.—I had not at all forgotten that; and I am now leading up to it, as you will see in a moment.

I was considering at the moment what one of the Tribunal said as to the necessity of these reports being founded upon a joint investigation, although they might be separate reports. I would like further to point out that I do not myself think that it was intended—but I do not myself see that these reports were intended to be invested, I do not use the words in any way profanely, with any peculiar character of sanctity, or that any very peculiarly great moral weight was necessarily to be given to them beyond what their intrinsic contents would justify. I have pointed out they were to be mere aids to the Tribunal. They were not to be the rule for the Tribunal. They were to assist the judgment of the Tribunal, not to dictate what that judgment should be; and here I immediately come to the point suggested by Lord Hannen.

If that be so, it becomes entirely unimportant—and this I say in favor of the United States Commissioners' report as well as in support of the Commissioners of Great Britain—it becomes comparatively unimportant to inquire whether these reports were founded upon a joint investigation or upon several investigations. They may have failed to comply with the direction given in Article IX; but if they supply means of information to enlighten the judgment of this Court upon the subject of regulations, with which alone they are conversant, then they come under the head of "any other evidence which either Government may submit;" and I do not shrink from putting my proposition as high as this: that up to the last moment, when discussion is taking place on the subject of regulations, if either party can put before this Tribunal matter which may, and in the opinion of the Tribunal ought, to affect their judgment upon the character of those regulations, it is within the competence of either to do it. You will say, according to the authority inherent in you, when the point has been reached when you desire to retire to your chamber and consider the question of regulations; but I say up to that moment—I put it as high as that—you ought to seek, and you certainly would be entitled to seek, for any information which can be put before you by either the representatives of the United States or the representatives of Great Britain which may help your judgment upon the question of regulations.

Now the answer which my learned friend makes and that upon which he bases his argument, is upon the ground of what he has been pleased to call manifest injustice. Indeed, I think he said "outrageous injustice". I think he used both expressions. That does lead me, really to ask the Tribunal to consider what is the constitution of their own body. I have pointed out that it is undoubtedly clear that as regards certain of these questions, which I have denominated and again, for brevity, denominate questions of right, they are simply to decide as judges and as jurists. I reaffirm that proposition; but when I come to the further question of what rules of evidence are to guide them in the determination of those questions of right, I have only to point to the Case of the United States, to the Appendices to the Case of the United States, to the Counter Case of the United States, and to the Appendices to the Counter Case of the United States, in order to show you and make it demonstrable that there is, in the view of those who represent that great community, and that there is, according to the constitution of this Tribunal, power to lay before this Tribunal what is not legal evidence in a court of justice.

Let me illustrate it. You have seen in the appendix to the Case a number of depositions of native Indians and other persons who profess to be more or less experts upon the question of the pursuit of seals. We have not had the opportunity of testing by the ready test of Cross-Examination one single one of those witnesses. We have not had the opportunity of inquiring into the character, the antecedents, the "trustworthiness"—to use my learned friend's expression—of any one of them: and yet we are—because the exigencies of the case require that we should, and because the constitution of this Tribunal contemplates that we should—willing that all that, *quantum valeat*, shall be regarded and taken into consideration by this Tribunal, this Tribunal weighing the evidence by such means as are available to them, discounting it where they have reason to suspect motive, or where they see intrinsic improbability; contrasting it with the evidence upon the other side, and by this means, (although not strictly legal evidence), arriving at what they will, in the result, regard as reliable and solid information upon which their judgment may be rested. I turn to the Counter Case, and really in view of what I must be permitted to call the extravagant expressions of my learned friend Mr Phelps as to the iniquity of our putting something forward which they have had no opportunity of answering, I do not understand how my learned friend can reconcile it to his moral sense to put before this arbitration the mass of matter which is to be found in the Counter Case, and which we have had no opportunity of answering.

Now let me make clear to the Arbitrators what I mean by this, I ought, to tell you how it is said this is justified. It is said that this is by way of answer to the Case of Great Britain. Well of course that is a mere *façon de parler*. None of it purports to be in answer to specific allegations in the British Case, and it only needs reference to any part of this book to see that if there be injustice of the kind which my learned friend insisted upon, it relates to all that portion of the United States Counter Case which I have separated from the rest and which runs with the exception of a few pages from page 135 to the end of the volume, what do I find there. I find there reports, amongst others—I am merely taking these as illustrations—of a Captain Hooper made in August of 1892, September of 1892, one of a Captain Coulson of the 6th September 1892, one of a Mr. Evermann of the 28th September 1892, one of Mr. Stanley-Brown of the 16th December 1892, and I find depositions of a number of witnesses whom we never heard, whom we have had no opportunity, I need not say of cross-examining or of inquiring into, extending from page 300 odd on to I think page 400. Therefore really this cry of injustice is as I conceive not in fact well founded. But I want to go a little further. It is said by my friend, not only is this Supplementary Report offered in evidence, but it is offered in evidence under circumstances in which it is sought as a supplementary Commissioners Report, to give it a special sanctity or character. I think the expression my friend used was "to put it on a higher plane". Let me absolutely and at once disclaim any such suggestion. I claim no special value by the reason of the fact that these were Commissioners appointed by Great Britain, beyond intrinsic value, after weighing their statements, contrasting statements on the same subject by witnesses on the part of the United States and judging of the inherent weight and probability and prower of self-recommendation which statements themselves contain—I claim in a word no other weight than the intrinsic merit of the thing itself demands. Thus I come back to my idea of a few moments ago, that we seek to

put this in evidence which under Article VII may be received by this Tribunal under the title of "such other evidence as either Government may submit," and let me say that I do not recede from, but stand by, what I said, that up to the moment that you retire to consider the question of Regulations, after you shall first have decided, as the Treaty requires, the five questions of right, raised for your distinct decision, it is within the competence of this Tribunal to receive any evidence offered by either Government which has any valuable light upon and in relation to the question.

The PRESIDENT.—Do you construe this as meaning legal evidence or information?

Sir CHARLES RUSSELL.—Information merely.

The PRESIDENT.—Not legal evidence.

Sir CHARLES RUSSELL.—Not legal evidence.

The PRESIDENT.—The words are, "with such other evidence as either Government may submit." You do not construe that as implying legal evidence.

Sir CHARLES RUSSELL.—No, Sir.

Lord HANNEN.—None of this was legal evidence, because it would not be subject to cross-examination.

Sir CHARLES RUSSELL.—Not subject to cross-examination.

The PRESIDENT.—The construction goes rather far. One would like to know how far it goes, and how far it does not go.

Sir CHARLES RUSSELL.—Certainly, Sir. Let me make that position clear because I think it lies at the very root of this matter. If this is a matter which at all weighs upon the mind of the Tribunal, or of any one member of the Tribunal, I would desire to enlarge upon it, and to enlarge upon it simply by saying *that there is no part of the evidence submitted on one side or the other which is legal evidence. The United States has no legal evidence.*

Senator MORGAN.—Why is it called "evidence" then?

Sir CHARLES RUSSELL.—Because it is evidence. It is called evidence because it is evidence.

Senator MORGAN.—Without being legal.

Sir CHARLES RUSSELL.—Without being legal certainly.

The PRESIDENT.—Even for the legal points.

Sir CHARLES RUSSELL.—Even for the legal points. So far as the legal points are concerned our position, and I must enlarge upon that presently, is clear. We say, as regards the first four questions, namely those relating to what I have called the derivative title, or the title founded upon estoppel, that they involve no questions of law that are really likely to cause, I think, any doubt or any difficulty, or I will venture to say, although I may be sanguine therein, any difference between those who represent the United States, and those who represent Great Britain.

Mr. Justice HARLAN.—What questions are those?

Sir CHARLES RUSSELL.—*The first four. They depend upon construction of public documents, and upon historical facts*—those first four questions. As regards the 5th question, there I agree there is a difference. We come there, undoubtedly to vexed questions, but in our submission and in our judgment—and it is the position we have taken in the original Case, and the position that we adhere to—so far as they depend upon any facts, those facts are not in dispute, *and it is upon the questions of law applicable to facts that are not in dispute that the decision of question 5 depends.*

Senator MORGAN.—*Do you mean Municipal law, or International law?*

Sir CHARLES RUSSELL.—*I mean both.* It is anticipating; but as the member of the Tribunal has mentioned that, I may perhaps avail myself of the opportunity of pointing out *that the title to property can only have its root of title in Municipal law.*

Senator MORGAN.—*That is what I understand your Counter Case to contend for.*

Sir CHARLES RUSSELL.—Yes, it can only have its root of title in Municipal law. It may be that if there is a dispute between the Municipal law of America and the Municipal law of Great Britain, International law may have a voice in saying which law—which Municipal law is to rule. It may be that International law may have an important voice in saying what are the sanctions which International law will recognize in relation to the rights of property within Municipal law.

It may be also that International law, where the Municipal laws conflict, will decide between them. The law of America, as you all know, finds its source and derives its strength and its history from the Common law of England. The Municipal law of each country is the same; and the root of title to property must depend upon Municipal law; and, where those Municipal laws agree, the function and part that International laws play in that controversy is indeed a very little one. However, that is aside from the question which I am here discussing.

Mr. Justice HARLAN.—Whether it depends on Municipal law or International law, how far does the question of the right of property depend upon the facts of seal life?

Sir CHARLES RUSSELL.—I have said that, in my judgment, so far as the facts of seal life are material for the question of law as to property in seals, they are not in dispute.

Mr. Justice HARLAN.—When we come to determine the question whether the United States has any right or property in these seals or in the herd, do we consider and ought we to take into consideration the facts in seal-life?

Sir CHARLES RUSSELL.—Certainly. So far as they are material, certainly.

The PRESIDENT.—I think we had better leave that for the moment and argue on the points now before us.

Sir CHARLES RUSSELL.—I should say so. I have been led away from my argument.

Mr. Justice HARLAN.—The question which I put to Sir Charles Russell was exactly in the line of the argument that he was making.

Sir CHARLES RUSSELL.—Quite so, Sir. I hope nobody thinks that I complain of any question or interruption.

The PRESIDENT.—I think, Sir Charles Russell, you rather swerved from the original plan of your argument.

Sir CHARLES RUSSELL.—Well, Sir "swerving," rather implies "shying" from it.

The PRESIDENT.—No.

Sir CHARLES RUSSELL.—I have been a little induced to go out of the line but I have not swerved from the proposition.

The PRESIDENT.—I do not say that the fault was yours.

Mr. Justice HARLAN.—Sir Charles Russell was discussing the question of the right of property, and upon what it rested.

Sir CHARLES RUSSELL.—Do not for a moment, Sir, suppose that I complain. I do not.

Mr. Justice HARLAN.—And the question I propounded to him was in the exact line of his argument and I did not intend at all to swerve him from that line of argument or to divert him. It is exactly in the

line of the question which he is discussing and which we are to consider.

Sir CHARLES RUSSELL.—Well, Sir, may I be excused from making any comment on that; beyond saying that I do not at all complain whether it was in the line of my argument or whether it was not in the line of my argument.

Mr. Justice HARLAN.—I did not understand you as complaining.

Sir CHARLES RUSSELL.—No, not at all; but I was in this, sense taken away from the point which I was upon,—the point of what is the meaning of the word "evidence". I did not anticipate that I should be called upon to go into this question etymologically; but I think as it has been adverted to, perhaps the readiest answer and the most practical answer is to state this broad proposition, that there is no part of the so called evidence in the United States Case, in the Appendix to the United States Case, in the United States Counter Case,—excepting always documents of a public character,—there is in the whole mass of it not one item that would be legal evidence in a Court of Justice over which any of the distinguished judges who are here might preside if he were either in America or in Great Britain. In other words, the volume of material that has been put before the Court satisfies none of those tests,—amongst others the great test of cross-examination,—which according to the systems of judicature prevailing both in England and in United States would make it receivable as strictly legal evidence if tendered. Now I hope I have conveyed my meaning.

Well then if that is so, I think the Tribunal will see—I think you, Sir, cannot fail to see,—that when you are dealing with two countries whose system of law and judicature is substantially the same, and when they have by the preparation of their Case and their Counter Case and their Appendices treated as matter of an evidenciary character to be put before this Tribunal matter which does not come up to the test of legal evidence, the word "evidence" in the seventh Article does not mean evidence which a Court of Law in either Country would receive if strict objection were taken.

But now, Sir, I have not yet, I am afraid, concluded. If I am right, the conclusion so far of course is this, that when the question of regulations comes on the *tapis*, when the point has been reached, at which alone the Tribunal are competent to consider the question of regulations, then they are entitled to avail themselves of any class of evidence within the wide description I have given to it to aid them in that question of regulations, and that evidence may be submitted on the part of either Government. And in connection with the right of either government up to the last moment to lay any matters before this Tribunal upon the question of regulations, let me point out two things. First of all you are aware, because it is part of the Treaty of Arbitration, and referred to in the Treaty of Arbitration, of one of the matters which comes before you ultimately for determination, namely, certain claims under the *modus vivendi* of 1892. The *modus vivendi* of 1892 is I presume in your minds.

The PRESIDENT.—Yes. We have a special Treaty for the *modus vivendi*.

Sir CHARLES RUSSELL.—Quite right.

Senator MORGAN.—It is hardly a special Treaty, it is made a part of the Convention.

Sir CHARLES RUSSELL.—It is made a part of the Convention but it is of a separate date and in a separate document.

Senator MORGAN.—The ratifications of both were exchanged at the same time—probably at the same moment.

Sir CHARLES RUSSELL.—I have no doubt, Sir, that you are right.

The PRESIDENT.—It is part of our law—I mean the law which institutes this Tribunal.

Sir CHARLES RUSSELL.—Quite. It is immaterial except to point out that the Treaty of Arbitration is dated 29th February, 1892, and the *Modus vivendi* or convention is the 18th of April, 1892. I am not challenging the correctness, of course, of what you say on the matter. The point I am upon is different.

The PRESIDENT.—Both were ratified together.

Sir CHARLES RUSSELL.—So, Sir, it has just been stated.

The PRESIDENT.—The ratifications were exchanged together.

Sir CHARLES RUSSELL.—I point out that under Article IV, in order to facilitate proper enquiries on the part of Her Majesty's Government with a view to the presentation of the case and arguments of that Government before the Arbitrators, it is agreed that suitable persons will be permitted at any time, upon application, to visit or remain upon the seal islands during the sealing season for that purpose. That is April of 1892.

The PRESIDENT.—The 18th of April, 1892, is the date of the Treaty.

Sir CHARLES RUSSELL.—That I have stated, Sir,—the 18th of April, 1892. What I want to point out, Sir, is that all the complaint of my friend here is that we were bound to set out in our original Case all that we had to say—all that we had to say both on the questions of right, and upon the questions of Regulations. You recollect that. That is my friend's argument. Very well; but here in April of 1892 is a provision that in order to enable the Government to present its case, facilities are to be given to visit the islands. That is April 1892. I need not remind you—You know enough of the history of the case to know—that the period as to which it is important, and the only important period in order to judge of the characteristics, so far as they are material, of seal life in the islands is the breeding season, June, July, August and September, and that those are the four months within which are embraced the fullest, the best, and the most complete opportunities for the inspection of seal life. And yet, my friend's contention is that even upon the question of regulations we were to be bound to deliver a Case by the 3rd of September of 1892. When you recollect the remoteness of Alaska to begin with, and the remoteness of Pribilof Islands from Alaska, it is obvious that it was contemplated by these parties that there should be a much extended opportunity, so far certainly as questions of regulation were concerned, of affording such information, and such assistance to this Tribunal on the question of regulations as a prolonged enquiry might give them.

Senator MORGAN.—But did not the 60 days which you had a right to claim amply provide for that?

Sir CHARLES RUSSELL.—No, I do not know that that would necessarily provide for it all, Sir, supposing they had extended it 30 days more, which is the period.

Mr. CARTER.—60 days.

Sir CHARLES RUSSELL.—To begin with, Sir, the period which is contemplated for extension is 30 days additional, not 60.

Senator MORGAN.—Not exceeding 60 days.

Sir CHARLES RUSSELL.—I say, Sir, that is an additional 30 days, not 60 days which is contemplated, but that does not refer to the question of the original Case at all but to the Counter Case only. My

friend's contention is that all this ought to have been in the Original Case. You follow, I think, that that is an answer to the objection. In other words the case is to be delivered according to the terms by the 3rd of September, though we only got our authority to send to these Islands under this Article in April of 1892. We get our authority under the Convention in April of 1892.

Senator MORGAN.—Was anyone sent to the Islands?

Sir CHARLES RUSSELL.—Oh yes, and his Report appears in the Counter Case.

Senator MORGAN.—He got there?

Sir CHARLES RUSSELL.—Oh yes—they were sent by both sides, and both sides have submitted these Reports in their Counter Case. Both have done the same thing. My friends, as clearly as we have, have departed from the idea, that the whole case was to be put out in the original Case. They have chosen, of course, to say that a great deal in their Counter Case which is new is by way of answer, but then you can say that anything is by way of answer. It is strictly correct in sense one—everything may be said to be by way of answer, but only in that sense. But the question of Regulations stands upon an entirely different footing, which I have endeavoured more than once to make clear, and if I have not succeeded in making it clear up to this point, I should despair of making it clear by any mere process of discussion.

But now, Sir I want to refer to another matter. My friend Mr. Phelps says "Oh but there is another objection that I have to the admissibility of this Supplementary Report"; and that objection he says is this: the Article provides for a Report, if they can agree, to be made jointly—if they cannot agree, for joint and several Reports; and he says, having made one Report, which we have already furnished to them under the circumstances which I will explain, they cease to be vested with authority to make any other Report. They became *functi officio*, my friend would say. Well, Sir, I do not care to stop to consider even that question. I myself do not see any reason why they may not make several Reports if they are so minded. I do not see anything in the Treaty which compels them to exhaust their functions in one Report; but let that pass. I base the claim to the admissibility of this document, not by reason of any sanctity attaching to it, because it comes from the Commissioners, but as being evidence—"other evidence" within the meaning of Article VII directed and intended to inform the minds of this Tribunal upon the question of Regulations when and if that question shall arise.

Senator MORGAN.—But, Sir Charles, *it might still be evidence might it not, and not have found its way into the record in due season according to the Treaty.*

Sir CHARLES RUSSELL.—*Perfectly, that is my whole contention, Sir. You have put, in one sentence, my whole contention, that, as regards the questions of Regulations, there is, as contained in Article VII, provision which has not relation to the rest of the Case; that is to say, when the Arbitrators come to exercise judgment, which is not judicial, which is not juristical, then they are to seek such evidence as either Government can place at their disposition—any matter which will have the tendency to affect or help their judgment upon the question.*

Senator MORGAN.—I beg to say that I have been misunderstood if I am supposed to have stated in any way that the power to ordain Regulations exists only upon a certain condition and to be exercised at a certain time.

Sir CHARLES RUSSELL.—I am not sure that I follow you, Sir.

Senator MORGAN.—I say that I have been misunderstood if I have been supposed to insist that the power to ordain Regulations exists only upon certain conditions and at a certain time,—if Counsel will allow me to say so—if this Tribunal should come out with an award in which the Regulations should be adopted or established, and the award should fail to find the existence of any of these conditions precedent, as they are alleged, I think that that award would be unassailable.

Sir CHARLES RUSSELL.—I am not prepared to say, Sir, that the award requires the recital of any conditions.

Senator MORGAN.—If it does not then it rests with the Tribunal to say whether the conditions have occurred, and at what time they will decide the matter.

Sir CHARLES RUSSELL.—*Undoubtedly, always as far as the Treaty* does not in express terms *state the way* in which those questions are to be dealt with.

Lord HANNEN.—The Tribunal is required to find on those five questions.

Sir CHARLES RUSSELL.—No doubt.

Senator MORGAN.—*Not as a condition precedent.*

Sir CHARLES RUSSELL.—As a condition precedent.

Senator MORGAN.—*I insist the other way.*

Sir CHARLES RUSSELL.—I am afraid now that I must make the charge that I am being diverted from the point that I was making.

Senator MORGAN.—I understood that Counsel quoted me as having said *the establishment of the condition precedent was a necessary foundation of the jurisdiction and power of this Tribunal to make the Award on the determination of Regulations.*

Sir CHARLES RUSSELL.—My learned friend, Mr. Phelps, may have so cited you, that I do not recollect, I certainly did not, and I do not think my learned friend did either. I content myself with reading what is plain English, and that plain English is, that the decision of the Arbitrators, a distinct decision, shall be given on each of the five questions.

Senator MORGAN.—*In their final Award?*

Sir CHARLES RUSSELL.—I will come to the question of the final Award, or interlocutory Award in a moment, that is not the point I am upon,—they shall give a distinct decision on each of those five questions.

Senator MORGAN.—*But only one Award.*

Sir CHARLES RUSSELL.—I will come to that in a moment, but that they shall give a distinct decision, I, for the third time, repeat on those five questions, and, it is only if the determination of those five questions shall leave the subject in a condition in which the concurrence of Great Britain is necessary, then and then only, the Regulations are necessary, and, whether a particular member of this Tribunal thinks so or not, that is my very respectful, clear and resolute submission.

Senator MORGAN.—I was merely setting myself right about it, as Counsel have alluded to the subject, I must say I have not intimated *the subject to be considered was anything less than the subject as to the preservation of seal life, not in Behring sea, but in any waters to which they might resort.*

Sir CHARLES RUSSELL.—I think that latter observation is not germane to the matter in controversy now, but, as it has been adverted to, when the proper time comes, *I shall hope to demonstrate that the sole area of dispute from the first moment the dispute arose down to the last moment, was Behring sea, and Behring sea only.* But I do not wish to be led away at this moment.

I must advert, still trying to bear in mind the point I was upon, to the suggestion of my learned friend that the Commissioners after they made their first Report were *functi officio*. I have told the Tribunal why I did not think that important, because I do not ask this Tribunal to attach any peculiar character or importance, or to place this Supplemental Report upon any higher plane, than any other evidence that might be offered to them for the question of Regulations with which alone it is conversant.

The PRESIDENT.—You mean that you put the Supplementary Report upon the same plane as the first?

Sir CHARLES RUSSELL.—Well, I myself think it is not upon any very high plane and I will tell you why. Let me point this out.

The PRESIDENT.—As to Article IX?

Sir CHARLES RUSSELL.—Let me call your attention to this Article IX: "The four Commissioners shall, so far as they may be able to agree, make a joint Report to each of the two Governments, and they shall also report either jointly or severally to each Government on any points on which they may be unable to agree." Then I want to know, is a peculiar sanctity or importance to be given to the Reports in which they differ, according to whether they come from the United States or Great Britain? The very fact that they are, as the event has turned out to be, and as one might well have supposed it would be, unable to agree in the Report, and take different views, and report in different language according to the stand point they take,—you cannot extend to two sets of discordant and disagreeing Reports,—you cannot to each extend any peculiar sanctity or place them on any peculiar plane.

Each must stand on its merits, and the premises on which it is based and the value the Tribunal thinks in the consideration of those Reports they respectively deserve,—no more and no less, and all this about special sanctity, or peculiar character, or high plane, or low plane, may be dismissed from this controversy as of no real moment whatever. The Treaty is contemplating Reports as wide asunder as the poles, and yet you are supposed to impart equal sanctity, and place each on an equal plane free from criticism. All is to go before the Arbitrators, if they disagree, the Arbitrators are to say to which they give effect, and how far they are to give effect.

I still have not said what I want to say on the *functi officio* point. It is this. That my learned friends did not themselves conceive that their Commissioners were *functi officio* when they made their first Report, is clear, because my learned friends will find that they have under a different date included in the documents which they have put in their Case, three Reports of different dates from their Commissioners. Very well.

Now I pass from that which I consider a very small point.

Mr. PHELPS.—One is the joint Report.

Sir RICHARD WEBSTER.—No, they are separate Reports.

Sir CHARLES RUSSELL.—If the joint Report is to be regarded there are three. There is the joint Report which may be said to be a Report in which the United States and British Commissioners agreed to differ, and two separate Reports by the United States Commissioners besides.

Now, it remains for me, before finally leaving this question of the meaning of "other evidence" within Article VII to beg the consideration of the Tribunal to these two points. I have pointed out in the Convention of April 1892, facilities were given to the Representatives of Great Britain to elaborate by further enquiry and examination this question of seal life so far as it had an important bearing either on the question of property, or upon the question of Regulations.

You will, of course, understand when I say that as far as the Supplementary Report, the admissibility of which is now alone in question, that is conversant, and offered only as conversant with the question of Regulations and Regulations only, and I have pointed out in April 1892, recollecting the season in which observation can be made is June, July, August and September, and regarding the remoteness of the region in question, and the infrequency of means of communication, that the parties obviously intended that the information to be derived from that further opportunity for examination should be in some way available.

I have a further observation to make that I would respectfully urge as having a most material bearing on Article VII. You are aware that the Convention of 1892 was the second Convention in the nature of a *modus vivendi*. You are aware that under the first Convention, as under the second, restrictions were submitted to by the United States as to the extent of its slaughter of seals upon the Islands themselves, and that the citizens or subjects of Great Britain submitted to restrictive regulations of a severe kind upon the question of pelagic sealing. Is it to be said with any show of reason that if the result of that experiment, if the result of the action of these two Conventions in the nature of temporary arrangements did throw any useful light upon the question of what Regulations should be ordained by this Tribunal, that this Tribunal is to be shut out upon that question of Regulations from the consideration of that which would have a clear and a direct bearing upon what ought to be the exercise of their discretion in the matter of Regulations itself? I repeat it might be, I do not affirm that it was, but that there might have been such evidence of the effect of the operations of either the *modus vivendi* of 1891 or of 1892 as might have thrown the most valuable light on the character of the Regulations which this Tribunal should ordain; and I say again, and it is the last observation that I shall make on that topic, that I do not the least recede from the position which I submit is an invulnerable one, that on the question of Regulations this Tribunal has no right to shut out from its consideration, upon its merits, any evidence offered by either Government up to the very moment that this Tribunal retires to consider the questions of Regulations.

Now I have one more duty to discharge before I sit down, and that is to show that the positions which I have taken up in this argument are the positions which the Government of the Queen took up in its original Case; that it is the position which it maintained when the discussion arose in the interval between the original Case and the Counter Case; and I do that not merely to prove the consistency of our positions, but to show to this Tribunal that the United States Representatives had from the first to the last notice of the plan which we were in good faith and with deliberation pursuing. I refer first in that connection to the Case originally presented. You will recollect that that case was presented on the 3rd of September, 1892, and at page 10 of that Case, the 5th Question of property and protection, is referred to, and those who prepared the Case proceed thus:

"This will be briefly considered, but the proposition which appears to be embodied in this question is of a character so unprecedented that in view of the absence of any precise definition it is impossible to discuss it at length at the present time. It will, however, be treated in the light of such official statements as have heretofore been made on the part of the United States, its discussion in detail being necessarily reserved till such time as the United States may produce the evidence or allegations upon which it relies in advancing such a claim".

I do not stop to consider whether the advisers of the Queen were right, or whether they were wrong in that position. Their view was that this was a claim, and is a claim, novel and unprecedented, that the onus lay upon those who put forward a claim so novel and unprecedented, to justify it by facts and by arguments, and that the onus was not upon Great Britain to disprove—the onus was on the United States affirmatively to prove.

Then it proceeds to the question of Regulations, and it sets out Article VII, and then it goes on: "The terms of this Article make it necessary that the consideration of any proposed Regulations should be postponed until the decision of the Tribunal has been given on the previous questions. Beyond, therefore, demonstrating that the concurrence of Great Britain is necessary to the establishment of any Regulations which have for their object the limitation or control of the rights of British subjects in regard to seal-fishing in non-territorial waters, it is not proposed to discuss the question of the proposed Regulations, or the nature of the evidence which will be submitted to the Tribunal." That is at pages 10 and 11 of the original Case. On page 135, Chapter VIII, of the same Case, in relation to the question of property and protection, it is there stated: "The claim involved in this question is not only new in the present discussion, but is entirely without precedent. It is, moreover, in contradiction of the position assumed by the United States in analogous cases on more than one occasion. The claim appears to be in this instance made only in respect of seals, but the principle involved in it might be extended on similar grounds to other animals *feræ naturæ*, such, for instance, as whales, walrus, salmon and marine animals of many kinds." And then it proceeds to say that these being admittedly animals *feræ naturæ*, it was the duty of the United States if they sought to make a claim to property in relation to them to establish their grounds consistently with a Municipal law of their own or any other country.

Then that subject is dismissed with this final note. "In the absence of any indication as to the grounds upon which the United States base so unprecedented a claim as that of a right to protection of or property in animals *feræ naturæ* upon the high seas, the further consideration of this claim must of necessity be postponed; but it is maintained that, according to the principles of International law, no property can exist in animals *feræ naturæ* when frequenting the high seas". And finally, in relation to Regulations, which is the matter which I have more immediately in hand, it proceeds—"Great Britain maintains, in the light of the facts and arguments which have been adduced on the points included in the 6th Article of the Treaty, that her concurrence is necessary to the establishment of any Regulations which limit or control the rights of British subjects to exercise their right of the pursuit and capture of seals in the non-territorial waters of Behring sea. The further consideration of any proposed Regulations and of the evidence proper to be considered by the Tribunal in connection therewith must of necessity be for the present postponed". It is clear therefore, what was the position (it cannot be doubted) *bonâ fide* taken up by the representatives and advisers at that time of the Crown as to the proper position in this question.

Then we come to the correspondence which took place between Mr. Foster and the representatives of the Queen in Washington in September 1892, after the Case has been delivered. Mr. Phelps has already referred to this matter, but I must follow it up. The pith of Mr. Foster's complaint is contained in the second paragraph of that letter, and I am

reading from the Appendix to the Counter Case presented on behalf of the Queen, Volume I, page 1.—"I am now directed by the President to say that he has observed with surprise and extreme regret that the British Case contains no evidence whatever touching the principal facts in dispute upon which the Tribunal of Arbitration must, in any event, largely, and, in one event entirely, depend. No proof is presented upon the question submitted by the Treaty concerning the right of property or property interest asserted by the United States in the seals inhabiting the Pribiloff Islands in Behring sea, or upon the question also submitted to the Tribunal of Arbitration concerning the concurrent Regulations which might be necessary in a certain contingency specified in the Treaty." That is the pith of the letter, which view, so expressed, he proceeds to argue at length. I will only say now in passing that I regret, and hope he regrets, one statement made in that letter.

It is the statement which is to be found on page 4 of the same correspondence, in which he suggests, and if I did not misunderstand him my learned friend, Mr. Phelps, today—No, I am wrong upon that; I do not think he did; I thought he did, but he did not,—it is a statement which Mr. Foster thinks it right to make, or a suggestion, that our Commissioners, the Commissioners of Her Britannic Majesty, have made up their Report not according to their own views of what they ought to report, but had taken advantage of the fact that the United States Commissioners' Report had been presented with the United States Case in order to concoct a Report which should be an answer to the Report of the United States Commissioners. The language in which he makes that very grave suggestion is this. "It was an advantage which it is conceived was not intended to be afforded to either party that in taking its evidence-in-chief, it should have the benefit of the possession of all the evidence on the other side, as also that in making up the Report of its Commissioners it should first be provided with that of their colleagues representing the other Government in respect to those points upon which they have failed to agree." That suggestion, of course, means what I have said; that the British Commissioners were going to do a dishonest and a dishonourable thing, that instead of making their Report as they conceived it right to make their Report, they were going to make a Report which was an answer to the Report with which they had already been furnished by the United States.

Now, I respectfully commend to this Tribunal the perusal of Lord Rosebery's letter to Mr. Herbert in answer to this argument and complaint of Mr. Foster. It is to be found on page 4. Of course, it is not for me to say, but I have listened with the attention it deserved to the argument of my learned friend Mr. Phelps and I did not detect that he had discovered any flaw in that argument of Lord Rosebery. Let me call your attention to what he says. At the top of page 5 he says, after drawing the distinction between the character of the questions. "It will be noted that the seventh article of the Treaty refers only to the Report of a Joint Commission, and it is by the ninth Article alone provided that the joint and several reports and recommendations of the Commissioners may be submitted to the Arbitrators, should the contingency therefor arise. The event therefore on the happening of which the Report or Reports and further evidence are to be submitted is there indicated by the Treaty;—that event being the determination of the five points submitted in the sixth Article unfavourably to the claim of the United States, and so that the subject is left in such a position that the concurrence of Great Britain is necessary for the purpose of establishing proper Regulations.

It will be noticed further, that the inquiries of the Commissioners are confined by Articles VII and IX to the question of Regulations, and have no reference to the points raised by Article VI. It is clear therefore that by the Treaty it was intended that the Report or Reports of the Commissioners should be produced, not as part of the Case upon the questions stated in Article VI, but at a later stage and then only in the contingency above referred to.

Then "with regard to question 5",—that is the property or protection point.—"of Article VI the Government of Her Britannic Majesty, believing that the alleged 'right of property or property interest' depends upon questions of law, and not upon the habits of seals and the incidents of seal life, have stated propositions of law which in their opinion demonstrate that the claim of such right is not only unprecedented, but untenable. These propositions will be found at pages 135 to 140, 153 to 157, and propositions 15, 16 and 17 on page 160 of the Case of this Government. This being the view of the Government of Her Britannic Majesty, it would have been altogether inconsistent with it, and, indeed, as they conceive, illogical and improper, to have introduced in to the British Case matter which in the opinion of Her Majesty's Government can only be legitimately used when the question of concurrent Regulations is under consideration." He then enlarges upon those views and proceeds—and this is the point to which I wish to bring this discussion now; "These are the views of the Government of Her Britannic Majesty, and they must maintain their correctness. But the Government of the United States have expressed a different view; they have taken the position that any facts relevant to the consideration of concurrent Regulations should have been included in the Case on behalf of Her Britannic Majesty presented under Article III, and that the absence of any statement of such facts in that Case has placed the United States at a disadvantage. The Government of Her Britannic Majesty while dissenting from this view are desirous in every way to facilitate the progress of the Arbitration and are therefore willing to furnish at once to the Government of the United States and to the Arbitrators the separate Report of the British Commissioners with its Appendices.

The Government of the United States are at liberty, so far as they think fit, to treat these documents as part of the Case of the Government of Her Britannic Majesty.

He then deals, in dignified and I think most courteous language, with the suggestion to which I have already referred, the injurious suggestion, and he expresses regret that it should have been made. He meets it by shortly stating that the Report and Appendices so far from being made to meet the Report furnished with the Case of the United States in the words in which they are now (that is October, 1892), presented to the United States, were printed on the 21st of June, that is to say, three months before we saw or could have seen their Commissioners' Report, and "laid before the Queen in pursuance of Her Majesty's Commission".

Then comes Mr. Foster's answer; and I think my learned friend did not quite realise what was the effect of Mr Foster's answer. We regard it as practically an assent to the position taken up by Lord Rosebery, an assent in this sense, that they were willing to take and did take the Report of the British Commissioners as practically all that we were going to offer on the incidents of seal life if and so far as they had any relation to property. We do not recede from that. We maintain the position still; that, so far as the determination of the

question of property interest in individual seals, in so-called herds of seals, or an industry carried on by the killing of seals goes, it stands for judgment upon facts that are practically undisputed. The question is, the principles of law that are applicable to those facts. In acknowledging this, Mr Foster says "If, as I believe and assume, this Report contains substantially all the matter which Her Majesty's Government will rely upon to support its contentions" not as to regulation "in respect to the nature and habits of fur seals and the modes of capturing them; I entertain a confident hope that all further difficulty upon the questions discussed in this note may be avoided." I answer to that, that Mr Foster may assume we do not seek to disturb his assumption, that in the document then communicated as far as we believe any of the facts in it are material upon the question of property protection,—we have no desire to add to that store of information, whether it is ample or whether it is deficient: but, on the question of regulations, we have never receded from the position, and do not recede from the position, we did take up in the original Case and are entitled to take up, and which is based on our construction, which we submit is incontestably the right construction, that that Article VII does, in the matter of regulations, provide for the possibility and admissibility of further evidence tendered by either Government.

He then concludes: "I deem it necessary, however, to say that the Government of the United States will, should occasion arise, firmly insist upon its interpretation of the Treaty, and that it reserves its right to protest against and oppose the submission to a reception by the Arbitrators of any matter which may be inserted in the British Counter Case which may not be justified as relevant by way of reply to the Case of the United States." Our position is this, as far as our original Case was concerned. We do not seek to supplement it by any incidents relating to seal life which have any bearing on questions of property except in so far as the new matter introduced in the Counter Case is there introduced in the terms of Mr. Foster's qualification as an answer to the allegations and statements and evidence put forward in the Case of the United States; but as to regulations I do not depart from the position I had previously assumed.

Now we get to the next stage of this matter which I wish to follow out so that there may be no dispute. The moment came for the delivery of the Counter Case. What do we do? In the Counter Case they follow the same position consistently throughout. On page 3 of the Counter Case there is this passage: "The subject of the regulations (if any) which are necessary and the waters over which the regulations should extend referred to in Article VII of the Treaty is considered in Part II. For reasons more explicitly stated in correspondence which will be found in the Appendix, the consideration of this point"—that is regulations—"have been treated in this Counter Case"—why?—"but only in deference to the wish expressed by the United States, that arguments upon all the questions with which the Arbitrators may have to deal should be placed before the Tribunal by means of the Case and Counter Case. The Government of Her Britannic Majesty have adduced these arguments under protest and without prejudice to their contention, that the Arbitrators will not enter upon or consider the question of the proposed Regulations until they have adjudged upon the five questions enumerated in Article VI, upon which they are by the terms of the Treaty required to give a distinct decision, upon the termination of which alone depends the question whether they shall enter upon the subject of regulations. Her Majesty's Government

reserve also their right to adduce further evidence on this subject, should the nature of the argument contained in the Counter Case on behalf of the United States render such a course necessary or expedient." They claimed that then, and I as representing the Government now claim it as within the right provided for by the Article VII to aid the Tribunal, together with the Report of the Commission—to aid them with such other evidence as either Government" may upon the question of the Regulations "submit".

Again at page 166 D of the British Counter Case the question is referred to and I think that that answers the question addressed to us by one of your body as to when this position was taken up. I have shown the position under the Original Case. I have shown the position in the correspondence with Mr. Foster, and now the position in the Counter Case: "Upon any discussion before the Tribunal upon the subject of Regulations, Her Majesty's Government will refer if necessary to the supplementary Report of the British Commissioners which is now in course of preparation and will it is believed be presented to Her Majesty's Government by the 31st of January 1893" and it was so presented and bears that date. The succeeding Chapters have been prepared in order that the Arbitrators may be put in possession of the consideration of the other facts material to the consideration of the question of Regulations and of the reply on behalf of Her Majesty's Government to the argument and allegations of fact contained in the case of the United States with reference to pelagic sealing and the management of the Islands in the past.

Now there is but one further stage of this controversy or discussion and it is the correspondence which my learned friend in solemn tones referred to this morning. That is the note addressed by the late Mr. Blaine when he had ceased to be Secretary of State and when Mr. Foster had succeeded to that position.

I refer with some reluctance to these questions of dispute between two ministers, to each of whom I desire to attribute equally good faith. I think it is unfortunate that these discussions should arise. I think, moreover, that it is unnecessary that they should arise. As I have said before, if you have ambiguity in a Treaty or any other document you may even refer to extrinsic facts, or you may even refer to documents which led up to that Treaty or agreement, in order to clear up the common ambiguity relating to subject matter and so forth, but in this case the parties have definitely, in English which is clear and intelligible to those used to construe English, expressed the purposes to which both Governments are committed; and I have therefore dealt, as the main point and purpose of my argument, with the construction of the Treaty itself as that which ought to guide the Tribunal. But as my learned friend has felt himself justified in referring to this I am bound to refer to the answer which was made by Sir Julian Pauncefote; I believe Mr. Blaine was very ill at this time. I think I am right in saying that. It is addressed to Mr. Foster, and dated September 9th, 1892, and is at page 8 of the appendix to the British Counter Case. I do not think it appears in the United States Case at all.

Mr. PHELPS.—Mr. Blaine's does.

Sir CHARLES RUSSELL.—Yes, but not the correspondence as a whole. Mr. Blaine writes "After an arbitration had been resolved upon between the United States and British Governments, a special correspondence between the Department of State and Lord Salisbury ensued, extending from early in July to the middle of November, 1891. The various subjects which were to be discussed, and the points which were to be

decided, by the Arbitrators in the affair of the Behring sea were agreed upon in this correspondence. A month later Sir Julian Pauncefote the British Minister and myself arranged the correspondence, and reduced the propositions and counter propositions to a Memorandum which was signed by us on the 18th December. Subsequently, the questions which had arisen between the two Governments concerning the jurisdictional rights", and so on "were expressed in the form of a Treaty concluded at Washington on the 29th February 1892;"—I do not think it is necessary to read every word of this, because it is not material to the point; but this is the important position.

"In all these steps, including the correspondence with Lord Salisbury, the Memorandum concluded between Sir Julian and myself, and the Treaty that was ultimately proclaimed on the 9th May, 1892, and which was negotiated by Sir Julian and myself not one word was said or intimated respecting the question now raised by the British Government as to"—I want to call your attention to this extraordinary language—"as to a secondary submission of evidence after the first five points set forth in Article VI had been decided by the Arbitrators. It was never intimated that any other mode of proceeding should be than that which is expressed in Articles III, IV—and V of the Treaty. I shall be surprised if Sir Julian Pauncefote shall differ in the slightest degree from this recital of facts".

I will read what, Sir Julian Pauncefote said in a moment, but there lurks in this (though not so obviously) as in the argument of Mr. Phelps the suggestion that we are here contending that there shall be two separate awards. First two separate hearings and then two separate awards. I do not say it would be outside the authority of the tribunal if they thought right to deal with it in separate awards. I do not express an opinion, nor is it necessary that I should one way or the other. But what is necessary, is that there should be an expression of the determination of the five questions submitted in Article VI. The intimation, it is quite enough, of the distinct decision of the Arbitrators on the point before they can proceed to the next point in the question of regulations; and as regards the question of regulations substantially on both sides the matter is entirely, before the Tribunal. My learned friends have said they have not read this Supplementary Report. I think they would have been wiser if they had, we begged them to read it without prejudice to their objection, but they have not apparently, and the result is that Mr. Phelps gives it an inaccurate description. He says it embraces a number of new depositions. It does nothing of the kind. It is a further argument on further consideration of the view that the British Commissioners took upon the question of regulations, nothing more.

Then, Sir, I have to read this answer of Mr. Blaine on this point.

The PRESIDENT.—Perhaps that would keep till to-morrow.

Sir CHARLES RUSSELL.—If you please, I should much prefer it.

The PRESIDENT.—Then, before we adjourn, I call the attention of the Agents of both Governments to the unsatisfactory character, I am sorry to say, of the shorthand report which has been given us. It has been a source of great inconvenience.

Sir CHARLES RUSSELL.—May I state what has been arranged, and I think it will be found to work well. We, on the whole, thought that, as the compositors who have set up the type for that print were not accustomed to the English language, or certainly not much accustomed to read it in manuscript, it was a very creditable production on the part of the compositors of this great capital. There are, undoubtedly, a

number of inaccuracies, but it has been arranged, with the assistance of your secretaries and the secretaries of the members of the Tribunal, that there shall be a corrected print at the end of each week, that is to say, that the prints for the week shall all be corrected, and there shall be a reprint of the corrected copy.

The PRESIDENT.—Then these are to be considered as proofs?

Sir CHARLES RUSSELL.—These are to be considered as proofs for temporary use.

The PRESIDENT.—That is a very good arrangement.

Adjourned till to-morrow at 11.30.

FIFTH DAY, APRIL 6TH, 1893.

Sir CHARLES RUSSELL.—Sir, when the Tribunal adjourned yesterday evening I was calling attention to the letter of Mr. Blaine of the 8th November 1892 addressed to his successor in office as Secretary of State, namely, Mr. Foster; and Mr. Blaine says that not one word was said or intimated respecting the questions now raised by the British Government as to a secondary submission of evidence. The first question that one asks one's self in relation to that statement is why anything should have been said. The parties have entered into an Agreement or Treaty which speaks for itself, which was to be judged as to its effect by the language which was used in it. But it is important to observe that Mr. Blaine in that letter abstains, as you would expect an honourable man to abstain, from suggesting that anything had taken place to in any way convey to his mind that the British Government took any different view at any time of the proper construction of the Treaty than that which they had consistently observed in their original Case, in the diplomatic correspondence, and in the mode in which they had presented their case to this Tribunal, but I feel grateful to my learned friend for calling attention to this correspondence, because unless I misconceive its effect, so far from impairing, it materially strengthens the position that I am now taking up. Because in this letter there were enclosed two documents, and I would respectfully, if I may, ask all the Members of the Tribunal to take before them the Appendix to the British Counter Case, Volume I, for they will not follow, as I should desire them to, the point I am now insisting upon unless they have that document before them. This is not printed in the United States Case. I hope the Tribunal will excuse my appealing to them and making some insistance upon this point, but it is really in aid of the Tribunal. I refer to the Appendix to the Counter Case of Her Majesty's Government, Volume I, page 9. On that page are set out the two documents which are thus headed. "Memorandum of Agreement referred to in Mr. Blaine's letter of November the 8th, 1892". And it will be seen by the Tribunal that that consists of two separate documents, both dated, though separately signed, the 18th of December, 1891. Let me remind the Tribunal before I read it of the point which is the great point made by my learned friend Mr. Phelps in his argument on the construction of Articles VII and IX.—That the contingency referred to in Article IX is the contingency of any Arbitration taking place at all. We, on the other hand, say the contingency referred to in Article IX is the contingency of the questions in Article VI being decided in a particular fashion; in other words, being decided so as to render necessary the concurrence of Great Britain to any Regulations. Now, bearing that point in mind, the contention, on my learned friend's side,—what is the contingency referred to,—I say that these documents demonstrate that the contingency was the contingency of the decision of those questions in a particular manner.

Now, what is the first of them? "The following is the text of Articles for insertion in the Behring Sea Arbitration Agreement as settled in the diplomatic correspondence between the Government of the United States and the Government of Great Britain". Then follow Questions 1, 2, 3, 4 and 5, as they appear in Article VI of the actual Treaty which constitutes this Tribunal. Then we come to the 6th clause of this Memorandum signed by Mr. Blaine, and Sir Julian Pauncefote; and here it is.—"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations".—I omit the words which for this point are immaterial and which immediately follow, and it goes on.—"The Arbitrators shall then determine"—need I dwell upon those words?—shall in that event determine; shall thereupon determine,—"what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary and over what waters such regulations should extend; and, to aid them in that determination, the Report of a Joint Commission, to be appointed by the respective Governments, shall be laid before them, with such other evidence as either Government may submit." The rest of this is immaterial to the point which I am now discussing. Recollect my learned friend's contention is that this ambiguity, would not have arisen, if it had not been that two distinct agreements were subsequently conjoined and made into one, and, as my learned friend implied, perhaps not incorrectly, clumsily put together. But I have demonstrated from one of these documents alone, and without reference to the other at all, that the contingency which was in that one document contemplated, was the event of the question of right (I use that expression for brevity) being decided in one fashion; and then, in that event and in that event alone, the determination, of the question of regulations came to the front.

I of course may be taking a sanguine and a partisan view of this case, but I do not desire to do so, and I confess my difficulty in understanding what answer can be made to that contention.

Now let us see what the next document is. You will observe that the document which I have read and especially clause 6 of that document which I have read, corresponds with Article VII of the actual Treaty. Where do we find Article IX or the germs if I may so call them of Article IX in the Treaty.

We find that in the next document; the following is the text of the Behring Sea Joint Commission agreement as settled in the diplomatic correspondence between the Government of the United States and the Government of Great Britain:—"Each Government shall appoint two Commissioners to investigate, conjointly with the Commissioners of the other Government, all the facts having relation to seal life in Behring Sea and the measures necessary for its proper protection and preservation. The four Commissioners shall so far as they might be able to agree, make a joint report to each of the two Governments and they shall also report either jointly or severally to each Government on any points upon which they may be able to agree. "These reports"—that is to say, whether "joint" or "joint and several" "shall not be made public until they shall be submitted to the Arbitrators, or it shall appear that the contingency of their being used by the Arbitrators will not arise."

Taking the two together is there any doubt what they mean. It will be observed that Article IX is not textually in strict accordance

with the second of those documents, but it furnishes the substance, although the language is somewhat different, but not in any sense which affects the point which I am submitting. Therefore if I were to stop here, and not refer to the answer which Sir Julian Pauncefote makes, I have made good, I submit, my point, that so far from this letter of Mr. Blaine, with enclosures accompanying it, serving my learned friend's point, it is an aid to the argument which I am presenting. But what is Sir Julian Pauncefote's answer; and here I have to make one observation. The Agent of the United States has thought fit to print the letter of Mr Blaine, but has not thought fit to print—I am very reluctant to make matters of complaint, and I do not do more than observe in passing that he has not thought proper to print—what I think ought to have been printed, namely Sir Julian Pauncefote's answer.

Mr. FOSTER.—May I say it would have been printed if it had been written and received in time to be printed.

Sir CHARLES RUSSELL.—I am very glad to have that explanation.

Mr. FOSTER.—It bears date two months after the letter to which it replies.

Sir CHARLES RUSSELL.—That is not quite the matter in point, but I am very glad to have that explanation. I understand the Agent to say it was not received in time to admit of its being printed. That is an ample explanation, and as obviously Mr. Blaine appeals to Sir Julian Pauncefote, it would have been, of course, a matter of propriety that the answer to that appeal should appear. However, the answer that the Agent gives is entirely satisfactory.

Now what does Sir Julian Pauncefote say? To begin with, he begins by showing why there was not an earlier answer for the reason that he appears to have been absent from Washington, and his statement shows that, because he says "Since my return to Washington I have had an opportunity of examining the official correspondence which has taken place". Then "I find", he says in the 2nd paragraph, "that in a note from Mr. Foster to Mr. Herbert of the 9th of November last I am inferentially appealed to by Mr. Foster and also by Mr. Blaine in support of the contention of the United States Government that the contingency mentioned in Article VII"—that ought to be Article IX by the way—"does not refer to the decision of the Arbitrators on the five special questions submitted to them, but to the inability of the Joint Commission to come to an agreement as to the Seal Regulations.

"I am at a loss to understand this reference to me, as throughout the whole of my negotiations with Mr. Blaine, and (during his prolonged illness) with the Assistant Secretaries of State (Messrs. Wharton, Adee and Moore) not one word was ever spoken or written which could even suggest the belief that I ever held any view as to the intention of the two Governments on the point in question, other than that which is plainly expressed in Articles VII and IX of the Treaty". With respect to those articles Mr. Foster states that the contingency referred to was that of an inability of the members of the Joint Commission to come to an agreement satisfactory to their Governments, and not as Lord Rosebery supposes that of a determination upon the five special questions adverse to the contention of the United States. Mr. Foster adds. "It is believed that Sir Julian Pauncefote, the negotiator on the part of Her Majesty's Government, will not dissent from this statement." Here is the answer. Sir Julian Pauncefote says:—"I desire to record my entire dissent from that view".

It follows as a necessary consequence that if the Arbitrators should determine that the concurrence of Great Britain is not necessary to the establishment of regulations for the protection of seal life, the seal fishery would thenceforth be exclusively regulated by the municipal law of the United States, and no "concurrent" regulations would be necessary. Therefore Article VII provides that if it shall be decided that the concurrence of Great Britain in any such regulations is necessary, the Arbitrators shall *then* determine what those regulations shall be. Article IX provides that the joint and several Reports of the Commissioners may be submitted to the Arbitrators "should the contingency therefor arise"; and further that the Commissioners shall make a Joint Report "so far as they may be able to agree", and that their Reports, joint and several shall not be made public until they shall be submitted to the Arbitrators, "or it shall appear that the contingency of their being used by the Arbitrators cannot arise". And then in order that I may spare the Tribunal the full reading of this document, because he proceeds to justify that view, I would ask the Tribunal to allow me to go down to about the middle of the page beginning "The contingency". "The contingency of such evidence being used could not arise till after the decision of the Arbitrators on the five special questions. It was quite unnecessary, therefore, to discuss during the negotiations, and by way of anticipation, the mode in which that evidence should be brought before the Arbitrators. The contingency of that evidence being used before the Arbitrators might never arise, and, if it did, the mode of its presentation would be a matter of procedure for the Tribunal to settle. Indeed, any discussion on that point would have been premature, as anticipating a decision adverse to the United States on the five special questions". And then he concludes by further references which I will not trouble the Tribunal with.

Now I pass from that correspondence and giving equal credit to Mr. Blaine for the very negative view that he expresses—the very negative view—and claiming equal credit for the *bona fides* of the dissent which Sir Julian Pauncefote has expressed, I recur to what I ventured to submit to this Tribunal yesterday, namely that, although it may be right to refer, where the question is a question left in doubt upon the construction of the Treaty—in any serious doubt—to negotiations which led up to it, and though that is certainly very frequently a matter or a mode of construction, or an aid to construction, I should prefer to say often and properly resorted to if the question arises on the construction of the Treaty of Arbitration as to the question of jurisdiction, as to the subject to be dealt with, as to the limits of the powers, and so forth, yet I admit, when you have a Treaty which as I submit on the face of it is intelligible and admits of no real serious doubt of construction, the application of any reference to antecedent diplomatic correspondence is at least a doubtful proceeding. You must construe the document upon intelligible rules with reference to what the document itself has said. I pass from that and I have to make a reference to another point even more remote which my learned friend Mr. Phelps, thought proper to make, or thought himself justified in making, still upon the point of the contingency referred to and in order to justify his view that the contingency referred to was the contingency of no Arbitration at all being held, and it will be in the recollection of the Tribunal that on page 52 of the printed note of the day before yesterday's proceedings, my learned friend Mr. Phelps, referred to Sir Julian Pauncefote's letter to Mr. Blaine on the 29th April, 1890, which contemplated a scheme of Regulations, and a scheme of Regulations only. My learned friend said

that that clearly contemplated that if the Commissioners who were to be appointed to frame that scheme of Regulations agreed in framing that scheme of Regulations, that that was to be binding. I perfectly agree; but does my learned friend suggest (I did not understand him to suggest) that that was the only matter that was in the view of the Government at that time? Not at all. There was in the view of both Governments at that time strongly, and always insisted upon by the Government of Great Britain, *that the questions of right must be settled*, that the question of damages to be paid by the United States if they were wrong.

Senator MORGAN.—*Do you mean property right?*

Sir CHARLES RUSSELL.—*I do not say property right merely, but questions of right,—I say, Sir, questions of right.* I do not limit it to one question or another. I say questions of right should be settled, and at that very time as my learned friend must know because I presume he is familiar with the negotiations that had been going on and that were continued after the Government of Great Britain were insisting upon their claim for compensation in respect of what they contended was the wrong committed upon the ships of their subjects by their, as they contended, wrongful seizure in Behring Sea. Throughout it cannot be doubted that this has been the position taken up by the Government of the Queen, a position from which I am not departing now and from which the Government has never departed. *They deny to-day, they have always denied, each and every part of the rights claimed as rights by the United States exclusive of others.* They have always demanded compensation in respect of the seizures which they contend were illegal; *but the question of right settled, they have always professed, and they profess today, their readiness to consider any fair question of Regulations, always bearing in mind that that question of Regulations is to be approached upon the assumption that outside its territory, that outside the additional limitations of water boundary conceded by International Law, the United States have different rights from the rights of the rest of the World frequenting those waters.*

Senator MORGAN.—Approached by whom?—That that question must be approached, in the way you indicated, by whom? By the Tribunal or by the United States?

Sir CHARLES RUSSELL.—What I have been stating, if you have done me the honour to follow me, Sir, is what the position of Her Majesty's Government on this question was.

Senator MORGAN.—I understand that.

Sir CHARLES RUSSELL.—That that question of Regulations is to be approached on the basis of no rights on the part of the United States except such as belong to her by reason of her territory rights, as we contend, well and accurately defined by International Law; and her position, therefore, has always been that it is impossible to approach this question of Regulations till you have *a priori* determined the question, whether there is or is not any exclusive or special right on the part of the United States. Once that question is got out of the way, then the ground is clear for the establishment of Regulations just, expedient, convenient in the interest of all who are concerned in the question. I was stating the position which I, representing the Government of the Queen, take up; which position is consistent with the attitude that the Government of the Queen has constantly maintained.

Senator MORGAN.—*I perfectly comprehended that point: but I did not understand if Counsel insisted that the question was to be approached by the United States or by the Tribunal in the manner indicated.*

Sir CHARLES RUSSELL.—I contend respectfully, and I should not have used language perhaps of so forcible a character to the Tribunal itself; but, of course, my argument involves the contention that that is the only mode in which the Tribunal can approach the question within its powers under this Treaty. The United States are, of course, equally bound if my construction of the Treaty is a sound one.

Now it must be obvious. I do not think my learned friends have made any attempt to conceal it—that the object of this motion is not confined,—the object, the motive of this motion—to the question whether this particular Supplementary Report is or is not to be admitted.—My learned friend Mr. Phelps's argument upon the question as I need not remind you took a very wide range, he gave peculiar importance to the motion especially in the beginning of his Argument yesterday in which he made it apparent that this motion did involve, if not directly, indirectly a question of very grave importance, as he quite correctly styled it and which must some time or other be determined by this Tribunal.

For my own part I thought the motion advanced by my learned friend was premature.

I think so still. I think the time for his motion would have been when we are approaching the question of Regulations and that he might have reserved until that time the point whether this was a matter which the Tribunal should or should not have dealt with and we would have been quite willing to have withdrawn this Supplementary Report altogether for the present from the Tribunal, and to have reserved to a more legitimate occasion the question whether it was or was not properly to be received. But now as the Tribunal has expended so much time in the patient consideration of its reception probably it had better be discussed to the end. I say that my learned friend gave this very marked importance to it because he yesterday said this: "Two theories have been propounded by the respective parties" (That is at the bottom of page 55 of the Report) "upon the construction of this Treaty, in respect to the method of procedure. As I have remarked, I believe this has been the subject of some diplomatic proceedings to which I shall ask the attention of the Tribunal, and the views of the other side have been communicated to us in a letter which accompanied, I believe, the notice that this Report would be offered so that we are advised, and have been before advised, of the position that the Counsel of Her Majesty's Government take upon the subject. Their theory is this: That there are to be, in effect, two hearings," two Arbitrations, two awards (I am stating what Mr. Phelps attributes to us) "first upon the five questions that are first propounded in the Treaty, next in the event that those questions should be decided in favour of the British Government, a further hearing upon the subject of Regulations, and that on that hearing fresh evidence, other evidence not theretofore in the case is to be admitted. That is their view. We deny altogether that the Treaty contemplates any such thing as two hearings, or that the case discloses any propriety for such a method of procedure, I do not say necessity but any propriety". And then he proceeds to argue, and this is really the real bone of contention between us,—that my learned friend contended that all these questions,—"Right" and "Regulations"—should be dealt with together, mixed up I know not how, that you shall determine "Right" in view of arguments about "Regulations", and "Regulations" in view of arguments about "Right", and to these subjects which are in themselves in their very nature distinct, marked by a clear dividing line, and a dividing line which as I ven-

tured yesterday to point out marks also a division in the character of the functions that this Tribunal has to perform, they are according to the contention of my learned friend to be mixed together and not as we contend to be kept distinct.

Well now it is said that we claim two hearings, two awards, two Arbitrations, and all the rest of it. Well I will not say that this is nonsense, because that would not be respectful, but my friend cannot suppose that we mean anything of the kind. We mean that this Arbitration, that this Tribunal, having heard the discussion of the questions of right and the evidence, from whatever source it is to be derived applicable to those questions of right, shall proceed to state their conclusion,—if that be their conclusion as to all those questions,—that their determination of those five questions is such as in their opinion to require the concurrence of Great Britain in Regulations within the meaning of Article VII, and, thereupon, my friends are to proceed to justify their claim for Regulations by such evidence as is relevant to that topic, and we are to meet their case by such argument and by reference to such evidence as is relevant to the same topic. It does not involve two awards; it does not involve two Arbitrations; it involves the simple act of keeping distinct and separate things which are in their nature distinct and separate. It involves no additional expenditure of time, and, although I said yesterday, and I wish to retract nothing that I said yesterday, that I thought this Tribunal would be reluctant to close the door against any important fact that might even recently have transpired which had an important bearing upon what ought to be the judgment of the Tribunal in the exercise of its discretion on the question of Regulations, I did not thereby mean to hold out to this Tribunal, or to suggest to this Tribunal, that we had any or the least idea of offering such volume of evidence as my words might seem to have suggested. Our case substantially is, as to Regulations and as to everything else, before this Court, with the exception of this Supplementary Report. We think it is irregularly before this Tribunal; and we have only yielded to the irregularity in order that there might be no ground for suggesting that there was a grievance on the part of the United States; and it was in deference to the suggestion of the United States itself, and contrary to the view which the advisers of the Government took that Lord Rosebery yielded to the objection of the United States, and furnished to the representatives of the United States, to be treated as part of our Case, the British Commissioners' Report. This Report which we propose to put in evidence is supplementary to that. And two questions, of course, arise in relation to it; and to those two questions I should like to address one word, and one word only. I mean the point thrown out by the President yesterday as to the word "evidence" appearing in Article VII.

But before I do that may I be allowed for one moment to recur again to a point which I made yesterday. My learned friend Mr. Phelps complained and made it a matter of grievance; and of course it is a great thing to get hold of a grievance if you can. A grievance is almost as good as a sound argument at times before some tribunals. My learned friend wants to get hold of a grievance, and he says: We have reason to complain also that even upon the question of property and property rights, and protection in relation to property rights dealt with under point 5 of article VI—why even on that point, says my learned friend, even on that point the Government of the Queen really do not tell us what their case is at all. Now I think it is important that it should be shown that there is really no foundation for this complaint.

I yesterday called attention to page 11 of the British Case (the bottom of page 10 and the top of page 11), where the subject is briefly adverted to; but if the Tribunal will be good enough to turn to page 135, chapter VIII, the Tribunal will find that we have discussed this question of property, so far as it was possible for us to do it in the then condition of things. For what was our position? Our position was and is, this: the claim of property is unprecedented. This claim of property is novel. It finds no warrant, as we contend, in law. You do not contend that seals are animals *feræ naturæ*. You do not contend that. You admit that they are not—at least I think so. I know you do not contend that they are: but at least you do not deny that they are animals *feræ naturæ*. Whether that will be denied or not, I really do not know, but we did not conceive that it could be denied, and thereupon I want to ask the Tribunal whether we were called upon, whether we could with propriety be expected to do more than to point out as we have done in chapter VIII the general principles which apply to property, and how property could be acquired in animals of that class, and to point out that according to our conception of those principles they had no relevance to the claim of the United States, and did not support their claim of property in the fur seals. Was it to be expected that we were with the necessarily imperfect information at our command at that time—to a large extent imperfect—to know what were the conditions of seal life, the incidents of seal life as to the going and the coming, the length of residence on the islands, their migratory return to the ocean—were we to set up hypothetically the incidents relating to that seal life which we might expect might be relied upon by the United States, in order to meet them?

I say that would have been illogical and more. I think it would have been entirely improper. We state our general principles. We say you do not come within those principles as far as we know; and when they do advance the grounds, as they do at the later stage, when we see their Case, and when we know the grounds upon which they put them, then we meet them as fully as we can meet them in the Counter Case presented. And now, Sir, I have got, I am glad to say, very close to the end of the argument with which I have had at this great length to trouble you.

But I desire to say something upon the point of what is the meaning of evidence in Article VII. "shall be laid before them with such other evidence as either Government may submit". It will be observed by the Tribunal that two questions arise in relation to this Supplementary Report. One only can be dealt with by this motion, namely, whether any evidence at all not in the Case and Counter Case can be submitted. The second point whether, if any evidence can be admitted, as we suggest it can and ought, whether this particular Supplementary Report is evidence, is, of course another question, and that you cannot judge (it is obvious) until you see what it is; and therefore the sole question that can be dealt with here is, whether any evidence touching regulations (I hope the Tribunal understands that) touching regulations: conversant with nothing else but regulations: directed and intended to be used for no purpose except regulations: whether any evidence of that kind can at all be submitted and can be and ought to be received. It therefore is clear that, for the purposes of the present motion, it is to be assumed that the Supplementary Report is evidence within the meaning of Article VII.

The question, therefore, is narrowed, so far as this motion is concerned, to the question whether any evidence can be admitted which relates to regulations, and which is not to be found in the Case or Counter Case.

But although that is so, I do wish to say a word upon what "evidence" does mean in this Treaty. It will save discussion hereafter, and I am happy to think that there are some parts of this discussion in which I think I can reckon upon the support of my learned friends. I need not point out that there are different meanings which may be given to the word "evidence". There is no necessity for referring to any but two for the purposes of this discussion, namely, evidence receivable according to legal rule and determined in a judicial proceeding—that is one kind of evidence; and the other kind is any material which will throw light upon or enable the Tribunal to arrive at a conclusion upon questions of fact, although it may not be evidence which comes up to the standard of technical evidence in a judicial proceeding.

The distinction is made more manifest when I remind the Tribunal of this, and there is no member of it that is not conscious of it, that what is legal evidence varies in different countries; nay, it varies even in parts of the Queen's Dominions; as for instance, with barely one exception, viz; questions relating to questions of pedig. ee—in the English Courts of Justice, hearsay evidence, as it is called, is not admissible. I, as a witness testifying in an English Court of Justice, would not be able, in proof of a given fact, to say that A. B. had told me that the fact was so. But that class of evidence is admissible upon other than questions of pedigree, even according to the Scotch tribunals, and the system of judicature which they administer. The Scotch system is, as no doubt many of you, if not all, know, largely founded upon the Roman law, and the Roman law, again, gave a very much wider interpretation of what was to be regarded, even in the judicial and technical sense, as evidence. So, again, France. The rules of evidence are much wider as to the reception of evidence than those which prevail either in England or in the United States. As far as the United States is concerned we stand upon common ground. Their system of judicature is founded upon our system of judicature; their common law is our common law; and I could indeed give no better illustration of the community of law, even upon matters of evidence, and could say nothing more creditable and praiseworthy of the judicature of the United States, and of the writings of its lawyers than to point out the fact that in England one of our principal text books upon law of evidence, known as "Taylor on Evidence", a book that my learned friends are, no doubt, familiar with, is absolutely founded upon—in great part taken from—a well known American work, by a well known author in the United States. I mean Mr. Greenleaf upon evidence.

We could not therefore have any better illustration that on this question of the technical meaning of evidence both countries are in accord, namely that an English text-writer on the question of evidence bases his work upon that of a United States author treating on the same subject. Then what does "evidence" mean in the language of a Treaty to which two nations are parties who profess substantially the same system of law. Well I think I may cut this part of my argument short, and I am sure that it will be with a sense of relief that you, Sir, will hear that. You can have no better means of knowing in what sense the word "evidence" was used in this Treaty, than by showing the way in which each of the parties have acted upon it. That being so, I turn to their original Case with its voluminous Appendices, and I make this broad statement which I do not think will be denied, that with the exception of some documents of a historical character, and public documents which would derive some sanction for their acceptance from their public character, there is in no part of the Case, or the Appendices of

the United States, any thing that would be strictly receivable in evidence if tendered in a court of law presided over by a judge clothed with no more than the ordinary authority of a judge of one of the High courts. They are Reports: the result of inquiries, in large part of correspondence with persons who are answering certain questions upon the incidents of seal life; what they think about this, and what they think about that, conversations with third parties in which third parties say what some fourth person has told them. Many comments, no doubt, may be addressed to the value of portions of that evidence, but you will not hear from me, Sir, you will not hear from any one on my side, any objection to the reception of that. We may ask you to discount this, or not to place implicit reliance upon that, but we will ask you to deal with it as both sides and all sides have dealt with it, as being a matter not bound to be brought within the technical rules of evidence as considered in ordinary judicial proceedings and established courts of judicature, but as meaning something much wider and something much broader. Indeed, I might point out this as an illustration of what I have said—the last illustration which I shall make. A number of so-called depositions, some of them taken in Canada, and some of them taken elsewhere, are included in the Case, and Counter Case or the Appendices to the Case and Counter Case of the United States. Now I need not say that even if the deposition, or oath which is involved in the notion of a deposition, were even legally taken, that would not make it evidence at all. It is a primary condition for the admission of evidence in an ordinary court that a witness who deposes shall be submitted to cross-examination. That is necessarily involved in it. But more than that. There is in Canada, as there is in England,—and, I do not affirm it to be so, but I think, as there is also in the United States of America—a statute directed against what is supposed to be the profanity involved in taking what are called extra-judicial oaths—in other words, a statute which renders it improper and which forbids the taking of oaths except in judicial proceedings and within certain accepted limitations; in the case of the United States depositions taken in Canada we find them taken and sworn to, absolutely against the law of that country.

Well now, Sir, I really have said I think enough to show you that the word "evidence" in this connection means not technical evidence according to the rules of courts of judicature, but that this Tribunal will look to all the information that is put before them even if it is only second, or third, hand,—using their own judgment, weighing the evidence, discounting it if need be, and giving it only the proper weight which they think it really deserves.

And now, Sir, I think I have only one other matter to refer you to, and that is the letter of Mr. Tupper in answer to the communication from Mr. Foster, the United States Agent, returning the Supplementary Report. You will recollect, Sir, that when the Supplementary Report was furnished to the United States Agent, it was also intimated to him that it was intended to forward it to the Tribunal. Mr. Foster then wrote,—I am not making any complaint,—his letter of the 27th of March, objecting to that being done: and Mr. Tupper, the Agent for Her Majesty, replied upon the 27th March, and I want to read to you that reply.—"The undersigned Agent of Her Britannic Majesty appointed to attend the Tribunal of Arbitration convened under the provisions of the Treaty concluded at Washington February 29th, 1892, has the honour to acknowledge the receipt."—and so on; I do not think I need read the formal part,—"and in reply thereto desires to state that it is

the view of Her Majesty's Government that the mode of procedure contemplated by the Treaty has not been accurately followed. While all the material bearing on the whole subject matter in dispute, intended to be used by either party was to be submitted to the other party, that part of such material which bore only on the question of regulations, and particularly the Report or Reports joint or several of the Commissioners of the two countries, should have been, it is believed, kept distinct from that part which bore on the questions of right; and that the latter,"—that is to say, as to right,—"should alone in the first instance have been submitted to the Arbitrators, the former, namely that part relating to regulations, only when the contingency therefor arose, or in other words when the determination of the questions of exclusive right had been arrived at".

It was upon this principle that the original Case of Great Britain was framed, and this course would have been followed but for the objections raised by the United States as stated in Mr. Foster's letter to Mr. Herbert of September 27th, 1892. In deference to those representations and in order to facilitate the progress of the Arbitration, Her Majesty's Government, while maintaining the justice of their contention, furnished to the Government of the United States and to the Arbitrators, the Separate Report of the British Commissioners and its Appendices, reserving at the same time their rights, as stated in Lord Rosebery's despatch to Mr. Herbert of October 13th, 1892. The Government of the United States in presenting to the Arbitrators, with their original Case, the separate Report of the United States Commissioners had, in the opinion of Her Majesty's Government, departed from the mode of procedure contemplated by the Treaty. It was in pursuance of the understanding contained in the correspondence above referred to, that Her Majesty's Government furnished to the Agent of the United States, and to the Arbitrators, the Supplementary Report of the British Commissioners which was referred to on page 166 D. of the British Counter Case. At the proper time Her Majesty's Government will submit to the Arbitrators that they are entitled to use this Supplementary Report, and they are quite willing.—I call special attention to this—"that copies should remain in the hands of the Representatives of the United States, without prejudice to any objection they may desire to raise. The Government of Her Britannic Majesty believe that the Arbitrators will desire to have at their disposal any trustworthy information which may assist them upon the questions referred to them for decision."

We were willing that they should without prejudice take this Report. If they had taken it and read it perhaps we might not have had this motion at all, but my learned friend preferred to have it returned, as Mr. Foster says, unread, and then to rely upon the statement derived, I know not whence, that it contains fresh depositions. It contains no depositions—no depositions whatever; and I do think that if even now my learned friends had looked at it, they would have probably not felt bound to raise the question so far as this document is concerned. But I am fully aware, as I have already made apparent, that that is not the real question that is here involved—that is not the motive of this motion—the mere rejection of this Supplementary Report. It is the determination of that question of procedure to which I have adverted as giving, in Mr. Phelps's view, and I agree with him, importance to this motion.

I do not desire to occupy your time, Sir, longer; but I must be permitted in two sentences to sum up the short result of my argument. First, it is clear that the Report or Reports of the Commissioners are

not in all events to go before the Arbitrators, because in Article VII they are to be laid before them only in the event of their having to consider Regulations: and they are to consider Regulations, and to have power to consider Regulations, only if the determination of the foregoing questions renders it necessary. They are not to have it laid before them or to be used by them until the contingency in Article IX occurs, and the real turning point in this controversy depends upon, and my learned friends felt it, what is that contingency mentioned in Article IX? If the contingency is that which we say it is, then I think there can be no doubt that our construction of the Treaty is the correct one. We say that contingency is not the contingency of any Arbitration at all, because we say the Treaty does not say so. The Treaty says that the contingency is the determination of the first five questions in the particular way. We say, in the next place, it cannot be the contingency of any Arbitration at all, because that would involve the assumption that if the Commissioners agreed as to the Report, that that Report upon the matter of Regulations was to be binding upon and to take the place of a decision of this Tribunal. But Article VII in clear and emphatic terms shows that that is not true because it explicitly says that it is to aid the Tribunal in the determination of the question. If I am right in that, what is the position of things? Then we reach a point in the controversy at which alone, and for the first time, the Tribunal are entitled to take into their consideration the question of the Report as bearing upon Regulations—The first time at which they are entitled to take into account anything bearing upon Regulations. We have had the machinery for the first five questions dealt with in the antecedent Articles—questions of right. They are got out of the way.

We come to questions no longer questions of right,—questions of accommodation; questions of convenience; questions of expediency; questions of justice; questions of equity; questions of general consideration; not of the right of A. or of B., but of the right of A. and B. and others in this question,—a question which does not depend upon legal right at all; and when you have got to that point then it is that the Report is to be laid before you with such other evidence as either Government may submit. Again, I warn this Tribunal against its being supposed, when I urge with insistence this point, that I am holding out to this Tribunal any prospect of a reopening of this question and of a branching out into new enquiries and into large fields of evidence. No; as I have told you, so far as I know, so far as I believe, this Supplementary Report, so far as we know, is ended and is closed. If they have anything to say when they see that supplemental Report, to answer it, to explain it, to contradict it, we do not object to their having that right. By all means let them read it; let them judge of it; let them see if it is a matter capable of answer or explanation, and act accordingly; and when my learned friend, in solemn and impressive tones, speaks of the grave injustice of having fresh matter put upon him which he has no opportunity of answering; allow me. I entreat this Tribunal, to ask them to understand this and see how little reason there is to suggest any special hardship or to suggest any real injustice.

I have before me their Counter Case. I am making no complaint about it or its contents. I may have to make comments hereafter; but I find in the Counter Case at page 207, what? On the 18th of July 1892 instructions addressed to a Capt. Hooper of the Revenue Marine cutter "Corwin", instructing him to proceed to the Pribilof Islands and to make certain inquiries and to report the result of those inquiries; and the result of his inquiries, accordingly, appears in four reports, the first

of which is dated the 17th of August 1892, at page 208 and extending from page 208 to page 213, containing a number of statements of more or less relevance, of more or less importance—statements of fact as to which we have not the slightest opportunity of cross-examining Capt. Hooper, or meeting the facts that he alleges.

Throughout the whole of this Counter Case, on almost every page of it, the illustrations that I have given will fit in with the rest—new matter as to which we have had no opportunity of inquiry and no opportunity of examination.

I am not making this as a complaint. I am meeting the complaint. I am pointing out that in an arbitration, conducted as this is, where evidence is admittedly put in as to which there can be no cross-examination, that there must be a certain proportion of that evidence as to which the other side can have no opportunity of meeting in anyway. It is so with their Counter Case. It is so as regards the Supplementary Report, with this important difference—that the Supplementary Report, if I am permitted to say so much in description of it (I do not know whether I am) is a supplementary report, not putting forward new facts, but expressing on further information and further consideration, the views of men who have had special opportunities of observing this question of seal life, so far as it bears upon Regulations. That is the character and purport of the Supplementary Report. It is not a new report like Capt. Hooper's, of new facts. It is comment, argument in the light of further inquiry and further investigation.

Now, Sir, I sit down, gratefully recognizing the patience with which this Tribunal has heard me. And before I sit down I wish to emphasize the point which alone gives grave importance to this question—that we claim from this Tribunal a decision as to which there shall be no doubt or hesitation; that the questions of right shall be determined before the question of Regulations is approached; and we shall use every effort which it is in our power legitimately to use to insure that result.

Sir RICHARD WEBSTER.—I cannot add anything to Sir Charles' argument.

The PRESIDENT.—We thank you for the perfect lucidity with which you have argued your point.

I would ask Mr. Phelps and Mr. Carter whether they have anything to add in point of observation to the foregoing argument.

Mr. CARTER.—Mr. President, before I begin what I have to say in reply to the argument which has been addressed to you upon the other side, there is perhaps one point upon which I ought to make an observation in order that my argument may be better understood and not misapprehended.

The learned counsel when taking his seat in the course of his argument yesterday, made an observation pertaining to what I may perhaps call the proprieties of forensic controversy in something like these words:

> I think, therefore, that I have so far made good my position. I ought not to say that I think so, as it is not the habit of counsel, with us at least, to express personal opinions; and I wish to guard myself, and desire to follow the course which is considered the proper course in these matters—to submit these matters, and let them be tested by the strength of the arguments advanced in support of them without bringing in—and I hope my learned friends will agree with me—personality of counsel for or against.

If his observations had stopped there I should not have thought it worth while to say anything; but he continued, and perhaps this was the purpose for which he introduced the observation:

> I am quite sure that there are many propositions put forward in the argument which I have had the pleasure of reading, presented by the United States, which I should be sorry, and I think my learned friends themselves would be sorry to commit themselves to as approving lawyers.

Of course I can say nothing as to the rule which learned counsel may prescribe for themselves in addressing a judicial tribunal. The intimation is that the opinions we express here and the arguments we address to the Tribunal should not be regarded as our real opinions, or as not necessarily so, but as simple suggestions which may be made, and which are submitted to the Tribunal without any expression whatever as to whether counsel believe in them or not, for what they may be worth. I cannot say that I think there would be any very high degree of value in a rule of that sort; and I think I should be quite unable to comply with it myself. I have a habit myself, whenever I feel strongly upon any question and have decided convictions in respect to it, to express myself accordingly. I have no other way of arguing it; and I do not object to the Tribunal's believing, when I speak as if I believed in the opinions expressed by me, that I really do believe them, and this, too, notwithstanding any derogatory estimate which an opinion of that sort might compel them to form concerning the soundness of my views as a lawyer.

I say this in reference to our printed argument, so far as I have had anything to do with it, and I say it in reference to anything that I have expressed, or shall hereafter express, in oral argument. I might add to this that I do not think the learned counsel himself very well follows the rule which he has suggested. He has a habit sometimes of speaking as if he really believed what he said, and as if he expected others to think he so believed. And I cannot help thinking that he has at times expressed himself with such force and earnestness as to indicate that he really did mean what he said and intended the Tribunal and ourselves to believe so. It would be very difficult for me to listen to arguments of counsel except upon a rule of that sort.

I say this for the purpose of showing, not that counsel are not at liberty to submit to judicial Tribunals opinions or arguments as to which they may have some possible doubt, with a view of allowing the Tribunal to weigh them; but I say it for the purpose of intimating that I have no objection to having the Court suppose that I really entertain the opinions which I appear to entertain and express myself as entertaining.

So much for that. Now let me come to the real subject of this debate. It has taken a very wide range indeed. I do not complain of the extent of that range. A great many things have been said in it perhaps not rigidly vital to the questions arising upon the particular motion which has been submitted to the Tribunal; but still they have a bearing upon it, and they are also things which at some time or other, in the course of the discussions which will take place before the Tribunal, would be likely to be said, nay, which would have to be said; and we may say in regard to them, or some of them, at least, that they may as well be said at the start, and the necessity of repeating them hereafter may thereby be dispensed with, possibly.

But what is the nature of the proceeding which is now before the Tribunal? What are we talking to? What was it that occasioned this present discussion? We can at least ascertain the point where we

began, however wide the range of discussion may be. We can go back and see what that point was, and what the Tribunal is moved to do.

The question arose in this way: We came here on the 23rd of March. The Tribunal assembled. The case, so far as the allegations and evidences of the parties were concerned, had been terminated long prior to that time. The Cases had been submitted many months before. The Counter Cases had been submitted a long time before. Those two methods were the only ones, as we supposed, provided by the Treaty by which anything in the nature of evidence, or any thing in the nature of information, if you please, aside from evidence, or of a lower grade than evidence, could be laid before this Tribunal. We never imagined that there was to be any further opportunity for the submission of evidence on the part of Her Majesty's Government. We thought, indeed, that we had much reason to complain in relation to the privileges which had already been assumed by Her Majesty's Government in the matter of the introduction of evidence. We thought we had much reason to complain; but in a certain sense that had passed. We did not suppose there would be any further occasion for renewing our complaints, or feeling that we were subjected to any disadvantage.

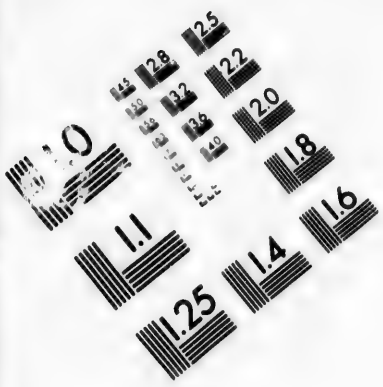
On the 23rd of March we took another step. We began the argument of the questions which are submitted to this Tribunal, and the argument of all of them—the question of jurisdiction in Behring sea, the question of the property interest of the United States in the seals and in the industry established upon the Pribilof Islands, the question of concurrent regulations—all the questions required by the Treaty to be submitted to the Tribunal, and as to which evidence had been taken. We began the argument in reference to them, by submitting our printed arguments in accordance with the provisions of the Treaty. We supposed, indeed, or should have supposed, if we had any occasion to consider it, that certainly, after a cause was ripe for argument, and after argument had in point of fact been submitted, there would be no attempt to introduce any further evidence, or anything in the nature of it. Such a thing never entered our minds; because, as we view it, such a thing is scarcely conceivable. We had made our argument, our principal argument. The Treaty indeed provided that if the Tribunal desired, or if the parties desired, further oral argument might be had in support of the written argument. That was a provision of the Treaty.

The PRESIDENT.—There is more than that in the provision. If you will read Article V, you will see that if the Arbitrators desire further elucidation with regard to any point, they may require a written or printed statement of argument.

Mr. CARTER.—That indeed, is true.

The PRESIDENT.—Or oral argument. There is a difference between the printed statement or argument and the mere oral argument.

Mr. CARTER.—Yes sir; there was indeed a provision, limited to action on the part of the Tribunal itself, that if it desired that some point should be further elucidated, it should in some manner be done. But that emergency had not as yet arisen. There had been no expression of any such desire on the part of the Tribunal, no application for that purpose to the Tribunal. Nothing of the sort took place. The cause, so far as the counsel was concerned, must be regarded as a cause with the proofs closed, and in a condition for argument; and not only in a condition for argument, but with the principal argument having actually been made. That was its condition.



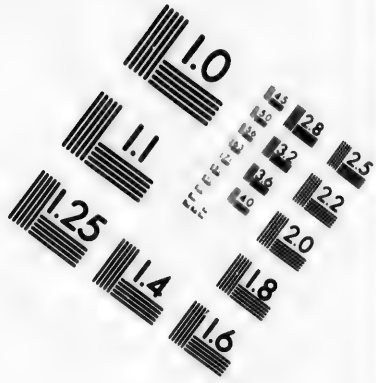
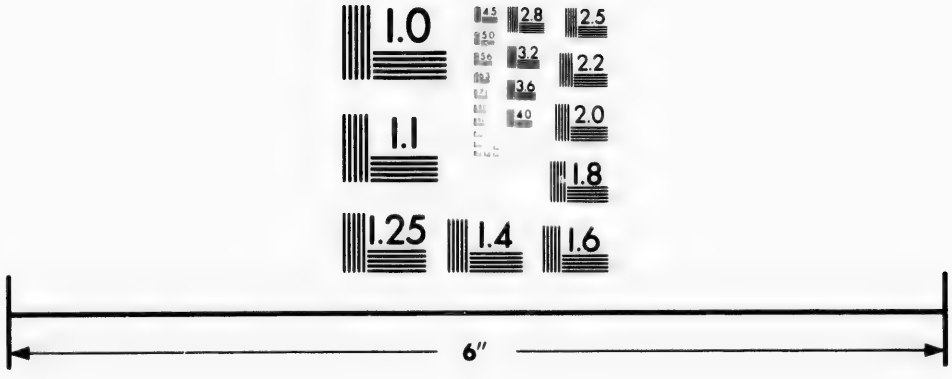
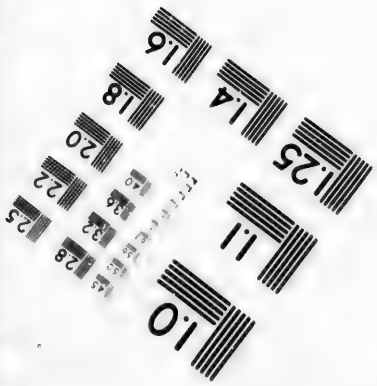
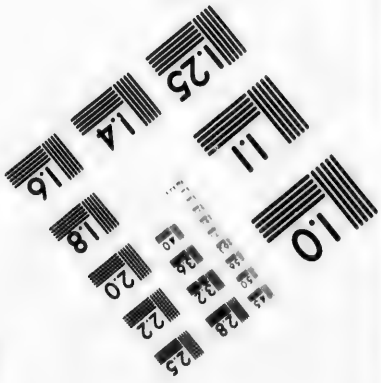


IMAGE EVALUATION TEST TARGET (MT-3)

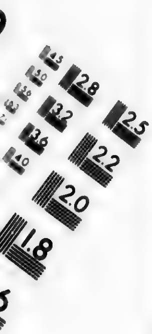






Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503



4.5
2.8
2.5
3.2
3.6
2.2
4.0
2.0
1.8

1.1
1.0

While it is in that condition, we receive from the Agent of the British Government a paper purporting to be a supplementary report of the British Commissioners appointed under the terms of one of Articles of the Treaty—with notice that it had been delivered to the members of the Tribunal. To say that we were surprised would but faintly express our emotions upon the receipt of a document of that sort. There was but one course, in our view, to take in regard to it, and that was to return it immediately to those who sent it and to return it, with the statement that we objected to any paper being placed before the Tribunal at a time and in a manner not allowed by the terms of the Treaty.

Where should we be if such a course were permitted? In the course of an experience at the bar now not very short, I have had all that I could, by any possibility, do to establish my side of a controversy against the *arguments* of my adversaries. To oppose their *arguments*, to overcome them, is all, certainly, that I could ever undertake to be able to do. But if my adversaries, in addition to the ability to answer my arguments by their arguments, could answer them also by the introduction of *new evidence*, the case would indeed be one for which I had no resources at all. That was what I felt about it, and what my associates felt about it.

That such a thing could be done at all was inconceivable to us. The *way* in which it was done was a matter which added to the amazement. The Tribunal was not asked whether it would receive a paper of that sort. We were not asked whether we had any objection to the introduction of a paper of that sort. It was *assumed by the British Agent that he had the right* to put it before the Tribunal, whether we liked it or did not like it.

Senator MORGAN.—Before the separate Arbitrators, you mean?

Mr. CARTER. Before the separate Arbitrators. I confess I am unable myself to distinguish between that act and another which I have never seen practiced, that after a controversy had been finally submitted to a judicial tribunal, one side should submit to the judges further considerations in the nature of argument. It was not done secretly. I do not complain of that. Oh no. We were apprised of it, and most distinctly apprised of it; but what was asserted on the part of our adversaries was that they had the *right* to do it. Well, if they had the right to do it then, they had the right to do it the day after and the day after that; and their right consequently had no measure or limitation except their own pleasure. That was the nature of the right which they assumed.

We immediately informed our adversaries by letter that we returned the paper, that we protested against the submission of it by them to the members of the Tribunal, and that we should make a motion to the Tribunal that it be dismissed from attention and returned to the source from which it was received. We received in answer to that a courteous letter from our adversaries, apprising us of the ground of their action. I will read that letter.

The PRESIDENT.—Perhaps Sir Charles will give Mr. Carter the letter which he has just read to us.

Sir CHARLES RUSSELL.—Certainly.

Mr. CARTER.—I read.

The undersigned, Agent of Her Britannic Majesty, has the honor to acknowledge receipt of the Honorable John W. Foster's communication of this day's date, and in reply thereto desires to state that it is the view of Her Britannic Majesty's Government that the mode of procedure contemplated by the Treaty has not been accurately followed. While all the material bearing upon the whole subject-matter in dispute intended to be used by either party was to be submitted to the other party, that part of such material which bore only on the question of Regulations, and particularly the report or reports, joint or several, of the Commissioners of the two coun-

tries, should have been, it is believed, kept distinct from that part which bore on the questions of right, and that the latter should alone, in the first instance, have been submitted to the Arbitrators; the former, namely, that part relating to Regulations, only when the contingency therefor arose; or, in other words, when the determination of the questions of exclusive right had been arrived at.

And that is a statement, if I understand it, that, according to the contemplation of the Treaty, whatever related to the subject of regulations was not to be submitted, either to the Tribunal or to the opposite party, until a determination had been reached by the Tribunal upon what is called by my friends upon the other side the questions of right; that then it was to be laid before the Tribunal, for the first time.

How does that defend the submission of this paper? That contingency had not yet occurred. The Tribunal has not as yet reached a decision upon what are called the questions of right, or upon any of the questions. It had not determined that the contingency had arrived upon which the question of Regulations should be considered; and therefore, in accordance with the views of the counsel themselves, the time had not as yet arrived when it was proper to submit to the Tribunal any such paper as this, if it bore, as they said it did, upon the question of Regulations.

They then proceeded:

It was upon this principle that the original Case of Great Britain was framed, and this course would have been pursued and been followed, but for the objections raised by the United States in Mr. Foster's letter to Mr. Herbert of September 27th 1892. In deference to those representations, and in order to facilitate the progress of the arbitration, Her Majesty's Government, while maintaining the justice of their contention, furnished to the Government of the United States and to the Arbitrators the separate report of the British Commissioners and its appendices, reserving at the same time their right, as stated in Lord Rosebery's dispatch to Mr. Herbert of October 13th 1892.

"Reserving their right," that is, their right to submit a further report, or further evidence, at the time when the contingency, according to their view of it, was reached; namely after the Tribunal had announced a decision of a certain character upon the questions of exclusive jurisdiction. They said they reserved that right; but whatever right they might or could have reserved, the contingency mentioned in that reservation, namely, the decision by this Tribunal of a certain character, had not arrived, and therefore the submission of the document at the present time was not defended by that reference to the correspondence between Lord Rosebery and the United States Government.

Further they say:

The Government of the United States, in presenting to the Arbitrators with their original Case the separate report of the United States Commissioners had, in the opinion of Her Majesty's Government, departed from the mode of procedure contemplated by the Treaty. It was in pursuance of the understanding contained in the correspondence above referred to that Her Majesty's Government furnished to the Agent of the United States and to the Arbitrators the Supplementary Report of the British Commissioners which was referred to on page 166 D of the British Counter Case.

I do not suppose that there was any *understanding* effected by the correspondence referred to; but that will be the subject for future observation.

The letter proceeds:

At the proper time, Her Majesty's Government will submit to the Arbitrators that they are entitled to use this Supplementary Report, and they are quite willing that copies should remain in the hands of the representatives of United States without prejudice to any objection they may desire to raise.

The Government of Her Britannic Majesty believe that the Arbitrators will desire to have at their disposal any trustworthy information which may assist them upon the questions referred to them for decision.

That is their statement. It will be observed that in this statement they go back to the time of the original preparation of the Case, speak of what they conceive to have been an erroneous construction of the Treaty by the United States in the preparation of its Case, and speak of their having conformed, in a manner, to that erroneous construction, and to a certain extent, as a defence of their present action in submitting this paper at the present time to the Tribunal in the manner in which it was submitted.

It was in this way that the question of the respective views of the parties as to how the Cases and Counter Cases should be made up, and what they should contain was brought into discussion before this Tribunal, and it is this reference to the former action of the parties which has enlarged the scope of the debate which might otherwise have been confined within somewhat narrower limits.

As that wide range has been given to it, and as the methods which have been pursued by the parties under the Treaty have been referred to in great detail and made the subject of discussion, I must take the liberty in these concluding observations, designed as a reply to the argument on the part of Her Majesty's Government, to go back to that original time and very briefly recount the circumstances under which the Cases and the Counter Cases were put in. Before I do that, however, I desire to make one or two observations suggested by the remarks which have been made by Sir Charles Russell in reference to evidence.

The Tribunal which was created by the Treaty could not well be provided with the ordinary instrumentalities which are employed by courts of justice for the purpose of ascertaining the truth upon disputed questions of fact. There could be no calling of witnesses and oral examinations and cross-examination of them; and, as that was not possible, it was not, of course, possible to apply to the Case those rigid rules of the law of evidence which are followed both in Great Britain and in the United States in reference to the introduction of evidence. That, of course, was plain; and it was equally plain, or at all events it was contemplated, that there would be differences of view upon questions of fact as well as upon questions of law, and that some means therefore should be provided by which the parties should be enabled to establish their views upon such disputed questions of fact. All that the negotiators of the Treaty could do under the circumstances was to provide the best mode in their power; and while they could not follow the rules of law exactly, to follow them so far as they could, and at least to observe those fundamental principles of equality between parties in the facilities which might be allowed to them for the purpose of conducting their respective contentions. The examination and cross-examination of witnesses was impossible; but was it impossible that each party should be permitted to answer the proofs and the allegations which his adversary might rely upon? Certainly, not. That result, although not susceptible of being accommodated in the exact and perfect way in which it is provided for in municipal Tribunals was still susceptible of being accomplished in a substantial manner and in a way sufficient to assure the administration of justice.

The Tribunal which was to consider the questions was to be a Tribunal composed of the most eminent jurists. It was properly to be presumed that they would be able to separate the material from the immaterial, to weigh the value which should be put upon this evidence and that evidence, and that although they could not have the benefit in the fullest and most complete extent of the ordinary rules which govern the introduction of evidence, still that they would be sufficiently aided

in that particular, if it were required that each party should submit his Case, his proofs, and his evidence to his adversary to the end that the adversary might criticise them, deny them, contradict them, meet them, modify them, or reply to them. That is an opportunity inseparable from the administration of justice. No proceeding deserves the name of being a judicial one unless each of the parties has an opportunity to know beforehand what the allegations of his adversary are, and what the proofs are upon which he designs to support those allegations. That facilities should be afforded for that main and essential thing is of course absolutely necessary. That is a point which no one—I will not say no lawyer—but no intelligent man living under English law, would think of ignoring or disregarding.

If we turn to the Treaty we find that provisions of that sort are made. Article III provides:

> The printed Case of each of the two parties accompanied by the documents, the official correspondence and other evidence on which each relies, shall be delivered in duplicate to each of the Arbitrators, and to the Agent of the other party as soon as may be after the appointment of the members of the Tribunal, but within a period not exceeding four months from the date of the exchange of the ratifications of the Treaty.

I suppose there is no question as to the entire lucidity of that clause. It requires no interpretation. "The printed Case of each of the parties" was to be furnished to the other; and if we had no precedents to guide us in respect to proceedings for international arbitration, lawyers—anybody—would easily understand what "printed Case" meant. It would be the case upon which you rested your contention; your allegations of fact; the evidences, the proofs by which you proposed to support them; and the conclusions of law which you drew from them.

Article IV provides:

> Within three months after the delivery on both sides of the printed Case, either party may, in like manner, deliver in duplicate to each of the said Arbitrators and to the Agent of the other party, a Counter Case and additional documents, correspondence and evidence in reply to the Case, documents, correspondence and evidence so presented by the other party

The Counter Case is provided for there. A method is thus provided by which each party might—not support his original Case—not that—but by which he might *reply* to the Case of his adversary, contradict his proofs, show them to be untrue, negative his allegations, contradict his conclusions of law. That was the opportunity which was afforded by the Counter Case.

The function of each of those documents, the office which it is to fill in this Arbitration, is carefully prescribed in the Treaty; so carefully and so clearly that no one could, by any possibility, misinterpret it.

I may be permitted to say something in relation to the mode followed by the Government of the United States in the preparation of its Case; and in order to do that, so that the learned Arbitrators may understand it, I should allude very briefly to what the presumable nature of the proofs was at the time when the parties were called upon to prepare their original Cases. What were the questions? I shall not stop to read them from the Treaty, but shall describe them generally.

In the first place, there were certain questions as to a jurisdictional power or authority over Behring Sea asserted by the United States to have been in some manner derived from Russia, what my learned friend Sir Charles Russell, has well enough styled a *derivative* title or right.

In the next place, there was the question of the right of property in the seal herds and in the industry established upon the Pribiloff Islands

of maintaining those herds, which was asserted by the United States—questions of property. Both of these were correctly described by Sir Charles as questions of *right*.

In the next place, there was the question what regulations might be necessary for the purpose of protecting the seals from extermination; which question by the terms of the Treaty was not, in the order of determination which the Arbitrators were to adopt, to be determined until after they had made a determination of the questions relating to exclusive jurisdiction; and not then, unless that determination was such as would require the concurrence of Great Britain in regulations for the purpose of preserving the seals. There was that order prescribed by the Treaty in respect to the consideration of the questions by the Arbitrators.

Now, as to the first of these three questions—that relating to the jurisdictional power or authority supposed to have been derived from Russia, there was not, it was to be presumed, any dispute whatever in the evidence. It all rested upon documents supposed to be accessible by both parties. I will not say that it was not possible that dispute might arise upon some question of fact, but at least it was not very probable; and in the course of diplomatic discussions respecting that question, I do not think any serious dispute had ever arisen in reference to any fact. The discussion was mainly in respect to the nature and interpretation of documents known to the world, and in the possession of both parties.

With respect, however, to the question of property in the seals the case was quite different. There, dispute, conflict, and a great deal of it, was to be apprehended. The question as to whether the United States had a property in the seals or not depended of course upon the nature and the habits of that animal, as all questions of property in animals depend upon the nature and habits of the animals; and what the nature and habits of those animals were, in many particulars, it was foreseen from the start might be the subject of very serious dispute upon which much conflict of testimony would be anticipated. Where were we to go for information in reference to the nature and habits of seals, and the modes by which they were pursued and captured and applied to the purposes of mankind? There was a great variety of sources of evidence. There were the persons in charge of the Pribyloff Islands, the agents of the United States engaged in maintaining that industry there, their statements founded upon personal knowledge, their reports, and all of these might be resorted to In addition to that, there were the Indians along the coast, who followed these seals in their migrations, and who had made for a long series of years, to a certain limited extent, the pursuit of those seals a part of their occupation. Their knowledge could be appealed to.

In the next place, there was a large body of mariners connected with the vessels engaged in pelagic sealing, masters of the vessels, officers of the vessels, seamen, hunters, all of them more or less familiar with the modes in which pelagic sealing was conducted.

I need not say here that every one could see that the great body of these witnesses belonged to a class whose statements would be very likely to conflict with each other, sometimes because they are dishonest, sometimes because theyare ignorant, sometimes because they are inexact; but, from a hundred reasons, we know that they are apt to conflict with each other.

This whole subject, therefore, was encumbered with the possibility, nay, the probability, that a great many of the allegations made by the

respective parties would be drawn into serious dispute; and the contentions of the several parties were to be supported by such evidence as they could obtain.

The PRESIDENT.—Perhaps we might stop here and resume a little later.

Mr. CARTER.—Certainly, Sir.

(The Tribunal thereupon adjourned for a short time.)

Mr. CARTER.—Mr. President, at the time when the Tribunal rose for its recess, I was making some observations concerning the conditions which this case presented at the time when it became necessary for the parties to prepare their Cases. I had said that there were three principal questions involved; that upon the first of them, that relating to the jurisdiction of the United States asserted to have been acquired from Russia, there was not likely to be any conflict upon the evidence; that upon the next question, that of property, there was likely to be a great deal of conflict; and I pointed out some of the grounds upon which it seemed probable that conflict would arise, and the extent of it. Then there was the third question, that of regulations. Of course, the determination of the regulations would involve a consideration of the subject matter to which it was designed that the regulations should be applied, and that was to the seal herd, and the taking of seals; and this question of regulations, therefore, depended precisely, as the question of property depended, upon the nature and habits of the seals, and the modes by which they could be taken, and were usually taken, for the purpose of being applied to the uses of commerce and the world.

Those two questions, the question of property, and the question of regulations, would depend absolutely upon the same kind of evidence, that is, evidence disclosing the nature and habits of the animals, and the modes in which they were taken. The questions themselves undoubtedly were entirely distinct. One was a question purely of property right; the other was a question what regulations were necessary in the absence of a property right, and where the seals could not be protected by the exercise of any rightful power, without the concurrence of other Governments;—what regulations with the concurrence of other Governments were necessary to promote what was assumed to be a common object, namely the preservation of the seals. The questions were entirely different in their character, but, nevertheless, the evidence upon which they depended was substantially the same.

Now, the Government of the United States came to prepare its Case, and the question arose how it should prepare it. Upon the first question it was plain enough that the evidence upon which it depended consisted of the documents relating to the history of the Russian dominion over Alaska, and to the various Treaties and diplomatic communications, and other documents which from time to time had made their appearance in connection with that subject. As to the next question, that of a property in the seals, it was necessary, of course, to place the facts upon which we designed to support our contention before the Tribunal.—But how place them? By witnesses? No, we could not call any before the Tribunal.—What must we do? We must resort to the best evidence which under the circumstances was obtainable. That is the rule in all judicial Tribunals, where one species of evidence deemed the best is not to be procured for any reason, you must resort to the next best. The only thing, therefore, was to consider what was next the best. There was a variety of sources of evidence, such as the opinions of scientific gentlemen, facts well known in natural history, all derivable from books, which might properly enough be appealed to, but the imme-

diate facts must be proved by the testimony of witnesses, and, as we could not call them before the Tribunal, we must do the best we could, and procure their depositions.

Well, how was this evidence to be presented. Upon looking to the terms of the Treaty, we are attracted at once to the provisions of Article III which I have already read and which relates to the printed Case. "The printed Case of each of the two parties accompanied by the documents, the official correspondence and *other evidence* upon which each relies shall be delivered in duplicate". Article IV provides for the Counter Case and is to the effect: "The Counter Case shall be delivered in duplicate, with the additional documents, correspondence, and evidence *in reply* to the Case, documents and correspondence and evidence so presented by the other party." Therefore it was plain enough that, at least, as to the question of rights derived from Russia, and as to the property questions, all the evidence should be presented in the Case. A provision in the Treaty might suggest a possible doubt in reference to the question of regulations. "If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur seal in, or habitually resorting to the Behring Sea, the arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination, the Report of a Joint Commission, to be appointed by the respective Governments, shall be laid before them, with such other evidence as either Government may submit."

This, as one can easily see, suggests the inquiry whether this Report, together with the other evidence referred to bearing on the question of regulations should not be withheld until the Tribunal had reached a determination that the concurrence of Great Britain was necessary, and that suggestion is further supported by what has been so much dwelt upon by my learned friends on the other side—the phraseology in parts of the Article IX of the Treaty which is to the effect that "the Reports shall not be made public until they shall be submitted to the Arbitrators, or it shall appear that the contingency of their being used by the Arbitrators cannot arise." We saw, therefore, that there was a certain contingency in which these Reports and other evidence bearing on the question of regulations might not be *used* by the Arbitrators. Was it the true construction of the Treaty that the Arbitrators were first to determine the question whether concurrent regulations was necessary or not and that until they had made that determination it was not in order for them to consider any evidence bearing upon regulations, and not in order that any evidence should be submitted to them? Was that so? Well, if that were the case, if it was not in order, if it was not regular, to submit the evidence on the question of concurrent regulations until the Arbitrators should make a determination of that character it would follow necessarily that there was to be a double Arbitration, a double hearing, and a double decision. When we look at the provisions of the Treaty on that point it is very plain that there was but one way in which evidence was to be submitted, and that was by the *Case* and the *Counter Case*, and but *one* Case and *one* Counter Case were provided for. In the next place it was perfectly plain by the express language of the Treaty that there was to be *one* written argument, and only one written argument to embrace all the questions; and in the next

place it was provided there was to be *one* decision and only *one* decision; and therefore it seemed to us quite inadmissible that the idea should be entertained that there were to be *two* hearings involving two separate submissions of evidence. I need not argue that notion further, for it is now declared by my learned friend on the other side to be simply nonsense. So that it was very apparent to us, and we never had any doubt about it, that all the evidence that we had bearing upon the controversy, and whether upon the question of jurisdiction, or property, or regulations—all the evidence which we designed to submit in support of our contention—must be submitted in the *Case*, for that was the only means pointed out by the Treaty, by which any evidence except evidence in reply could get into the hands of the Arbitrators.

The Case of the United States was prepared faithfully in accordance with that view. The whole mass of evidence by which they designed to support their contention, whether bearing upon the question of jurisdiction, the question of property, or the question of regulations, was placed in the Case, and fairly and unreservedly and fully submitted to the observation, the criticism, the answer, the denial, of the other side. There was absolutely nothing withheld. We had gathered together a multitude of depositions in reference to the nature and habits of the seals, all establishing or tending to establish, as we supposed, that their nature and habits were such as to make them the property of the United States. We had gathered evidence tending to show that if the Tribunal should come to consider the question of regulations, that no regulations would be effective for the purpose of preserving the seals, except absolute prohibition of pelagic sealing. We exhausted all our means of information then available to us for the purpose of putting before the Tribunal and putting into this Case, to the end that our adversaries might consider it and answer it, every fact that we designed to bring forward to sustain our contention in this controversy; and I have not as yet heard it suggested upon the other side that there has been any withholding by us of the slightest circumstance from that Case to which we have at any time resorted for the purpose of supporting any of our contentions. Those Cases were, I think, in the month of September, in the first week in September, exchanged. We delivered to the Agent of the British Government our Case, made up in the manner in which I have described. We then received from them their Case, and proceeded, of course, with interest to examine its contents. What was our surprise to find that in that Case of the British Government not one item of proof in relation to the nature and habits of the seal, or the mode by which they were pursued, not an item of evidence bearing on the question of property, not an item of evidence bearing on the question of regulations. What could be the intention of this? Is it possible, we asked ourselves, that Her Majesty's advisers have been of the opinion that they could safely submit the interests of Her Majesty's Government to this Tribunal without any evidence at all upon these subjects; or are they in some manner aware of our opinions respecting the nature and habits of the seal, and believe that those opinions are correct so that they cannot in any manner assail them? What is the view which Her Majesty's Government entertain upon these points? We were wholly at a loss. The thought did occur to us, only to be dismissed, at first at least, but still the thought did occur to us, "is it possible that the advisers of Her Majesty's Government have deliberately conceived that they could withhold all evidence upon which they designed to rely upon these questions until they have received our Case and know what our position and our evidence is, and then for the

first time, produce their evidence under the pretext that it is a *reply* to ours, so that we shall have no opportunity to meet it? Can that be possible"? Why, no; we could not think that. Both sides were represented by lawyers, and by lawyers who were bred in the same school of jurisdiction and procedure; and both sides equally knew that in that school of jurisdiction and procedure nothing was more zealously regarded, nothing more zealously protected than perfect equality between the contending parties in respect to the use of the instrumentalities which a court of justice employs in order to gain a knowledge of the truth—a perfect equality.

Well, it was a very serious question for the advisers of the United States to determine what should be done under the circumstances. Should they go on without objection or protest, and then perchance, when the Counter Case came in, find there was an immense mass of evidence to which they would have no opportunity to reply, and go before this Tribunal under those disadvantages? Why, if there had been no material importance in the dispute a disadvantage of that sort was so shocking to the professional sense, I may say, that we could not stand under it. What should we do? Revoke the Arbitration? My learned associate perhaps intimated in the course of his argument, that if his counsels had been followed, that would have been done. It is no consequence what our counsels were in that particular; but to revoke the Arbitration, because the Case had not been made out according to our view, would be a step in which we could ill defend ourselves before the civilized world, and, upon a question respecting an International Arbitration, the opinions of the civilized world had to be taken into account. We resorted to arbitration because perhaps the civilized world might think that we were not justified in resorting to the dread arbitrament of force in order to defend our claims to the seals. Could we go back and resort to that dread arbitrament of force, because we disagreed about the meaning of the terms in which written papers had been framed? However easy it may have been to satisfy technical lawyers that our opinion was correct, it would have been somewhat difficult to satisfy the opinions of mankind that it was right to revoke the arbitration on that account. That course was out of the question. What else could we do? Well, we could remonstrate with Her Majesty's Government and humbly request of it that it would furnish us with such evidence as it designed to rely on for the purpose of sustaining its contentions; in other words, we could resort to entreaty, involving self humiliation; and we might further insist that we would go on according to our own views, and if, when the Counter Case of Great Britain came in it was found to contain matter which ought, according to our views, to have gone into its original Case, we could then, when we came before the Tribunal, assume that *it* had a jurisdiction to determine the regularity and propriety in which the Cases had been made up, and ask it to strike out from the Counter Case of Her Majesty's Government everything which in fairness ought to have gone into its original Case. That we could do.

Well, for the purpose of saving the Arbitration the United States resolved upon a course of that character—a conciliatory method, and, if it was not agreeable to all of us, I am bound to say that, so far as I am concerned, I think it was a proper one—and they therefore, addressed a diplomatic communication to the British Government calling its attention to the true interpretation of this Treaty, to the circumstance that the Case of Her Majesty's Government had been made up in violation of its plain terms, and to ask that the mistake should now be remedied

so far as possible. It could not be remedied altogether. The counsel for Great Britain were already in possession of our Case and that knowledge could not be recalled. Just look at it for a moment if you please. I ought to call the attention of the learned Arbitrators to the special advantages which Great Britain thus gained. In the first place they knew what our grounds were before committing themselves. We had committed ourselves fully and completely, not only in respect to allegation, but in respect to evidence. They had not committed themselves at all. In the next place they had gained the advantage of selecting their witnesses. There was a great number of witnesses who had, in one form or another, officially or otherwise, spoken in relation to the nature and habits of seals and to the course of procedure upon the Pribylof Islands. Official Reports in some instances contained something which might be understood to be for the benefit of Great Britain, and something for the benefit of the United States. There was a great deal of a documentary character out of which one party might pick something which it supposed to be to its advantage and the other party might also select something which would be to its advantage.

Well now, if a party was obliged to decide in the first instance whether he would make such a person his witness or not, he would be obliged to say to himself, "I must use this man as my witness, because I do not know that my adversary will use him as his, and therefore I must decide now, and make him my witness now." What advantage did the counsel for Great Britain gain in that particular. Why, they were able to look into the Case of the United States, and see the various reports which had been made parts of the evidence in that Case, and if there were anything tending to favour the interests of Great Britain, they could get the benefit of it without making the persons who made the reports their witnesses—could treat their own witnesses as being the witnesses of the other party, and gain all the advantages derivable from that treatment—very decisive sometimes, as the learned Arbitrators will easily understand, in judicial controversies. That advantage they gained.

Another advantage they gained. There were quite a number of points which would presumably be the subjects of dispute, as to which the depositions of witnesses, pelagic sealers, inhabitants of the coasts of the Behring sea and its vicinity would be called. How many witnesses was it necessary to call to establish any particular position? The United States in framing their Case were obliged to determine that question with no lights other than conjecture, and say. "We will call so many witnesses, and we will not go any further. We think that is sufficient to establish the fact, unless it is overcome by the number of witnesses adduced upon the other side. That is a matter as to which we cannot determine beforehand. We can only form a conjecture in reference to it." The United States made up its Case under those disadvantages. But the counsel for Great Britain waited until they came to prepare their Counter Case and could then say, "to *this* point the United States has introduced so many witnesses: we will introduce a dozen more. As to *this other* point the United States has introduced so many witnesses: we will introduce a dozen more;" and so on through all the disputed questions. That is another very important advantage which they gained.

But finally and decisively they gained this overwhelming advantage, that they were able to meet the testimony of the United States in all the ways in which adverse testimony may be met—by contradiction, by qualification, by overcoming it by the production of other and adverse

testimony, and the United States could not do it at all. They could impeach our witnesses. They could show that this witness was not to be believed under oath; and that that one could not be believed under oath. They could show by circumstances, which they might prove by depositions, that a certain class of witnesses were subject to certain objections not perceptible upon the face of the testimony—in a word, in all the forms in which the testimony of an adverse party may be met and overcome, Great Britain secured the opportunity to do it, and deprived us of it. I am speaking now upon the assumption that when she came to frame her Counter Case she should incorporate into it a large mass of evidence relating to the habits of seals and other testimony as to the seals. If she did not choose to do it, no matter; all right. But the *ability* to do it was the advantage which the Agent of Great Britain had gained.

And he gained it so that it could not be taken away from him.

Whatever might be done in the way of obtaining from Great Britain evidence she had withheld, nothing could repair the disadvantage to which we had already subjected ourselves; nothing could take away from her the advantage which she had gained. She had it securely in her possession by the course which she pursued.

Now under those circumstances the course we determined upon was the conciliatory one; to ask them at once for the evidence upon which they designed to maintain their contentions, so that we might have it before the preparation of our Counter Case, and, if they chose to offer it to us, to accept it as a compliance with the conditions of the Treaty, although it came too late, and although it came under the enormous disadvantages to us, and advantages to them, from the circumstances upon which I have dwelt. Consequently, on the 27th September 1892, Mr. Foster thus addressed Mr. Herbert, who was then in charge of the British Embassy in Washington: "Department of State Washington, September 27th 1892. Sir, on the 6th instant, the day after the receipt by me of the printed Case of Her Majesty's Government, called for by the provisions of the Arbitration Treaty of 1892; in a Conference which I had the honor to hold with you at the Department of State, I made known to you the painful impression which had been created upon me by a hasty and cursory examination of that case, but I withheld any formal representation on the subject until I could have an opportunity to lay the matter before the President. His absence from this Capital, and the attendant circumstances have made it necessary for me to delay a communication to you till the present". The learned Arbitrators will remember that at this time Mr. Foster, the Agent of the American Government, had been made Secretary of State. "I am now directed by the President to say that he has observed with surprise and extreme regret that the British Case contains no evidence whatever touching the principal facts in dispute, upon which the Tribunal of Arbitration must in any event largely, and in one event entirely, depend. No proof is presented upon the question submitted by the Treaty concerning the right of property or property interest asserted by the United States in the seals inhabiting the Pribiloff Islands in Behring sea, or upon the question, also submitted to the Tribunal of Arbitration, concerning the concurrent regulations which might be necessary in a certain contingency specified in the Treaty. If it were fairly to be inferred from this omission that no proofs on these important points are intended to be offered in behalf of Her Majesty's Government, no ground for criticism or objection by the Government of the United States could arise, since it is within the exclusive province of

either party to determine what evidence it will submit in respect to any part of the controversy or to refrain from submitting any evidence at all; but such inference as to the course contemplated by the British Government does not seem consistent with certain statements made by its Agent in the printed Case submitted by him".

Now then, at this point, I will interrupt the reading of the letter for this purpose; I wish to call your attention to what was said in the Case in respect to these omissions. I now call the attention of the learned Arbitrators to the Case of Her Majesty's Government and to what is said in it at page 135. It begins thus:—"Point 5 of Article VI.—Has the United States any Right, and, if so, what Right of Protection or Property in the Fur seals frequenting the islands of the United States in Behring sea when such seals are found outside the ordinary 3-mile limit?—The claim involved in this question is not only new in the present discussion, but is entirely without precedent. It is, moreover, in contradiction of the position assumed by the United States in analogous cases on more than one occasion. The claim appears to be, in this instance, made only in respect of seals, but the principle involved in it might be extended on similar grounds to other animals *feræ naturæ*, such, for instance, as whales, walrus, salmon and marine animals of many kinds." And it goes on to argue that there is no foundation for a claim of property, and treats it as a mere question of law. At the close of this particular part of the Case of Great Britain it is said: "In the absence of any indication as to the grounds upon which the United States base so unprecedented a claim as that of a right to protection of, or property in, animals *feræ naturæ* upon the high seas, the further consideration of this claim must of necessity be postponed; but it is maintained that, according to the principles of International law, no property can exist in animals *feræ naturæ* when frequenting the high seas." Now then the position taken by Great Britain by the form in which her Case was made up in this particular is based upon these two grounds: first, that a seal is an animal *feræ naturæ*, and therefore cannot be the subject of property at all, and that the question whether he is a subject of property at all is a question of law and not a question of fact. Next, if the United States should happen to show any grounds or reasons upon which they claim that the seal is a subject of property, she Great Britain will answer that claim when those grounds and reasons are shown and will postpone the consideration of the case until that time. That is to say, if the United States undertakes to show by argument that seals are property, we will answer the argument when the case is made. If they undertake to show by evidence that the seals are property, we will answer that evidence by evidence of our own. That is the position which they took. Well, I have one or two observations to make upon the face of that. In the first place, we admit that the question whether seals are the subject of property or not is a question of law. But it is a question of law which depends upon facts, and how the question of law is to be decided, of course no one can tell until it is known what the facts are.

In other words, the question whether there is a property in seals or not depends upon the nature and habits of the seals, as is now fully admitted upon the other side, but was at this time denied; and in order to know what the nature and habits of seals are, of course, evidence must be given to show what they are. Now the question of property was submitted to the Tribunal. If we had any evidence as to their nature and habits on which we contended that the property in them was in the United States, it was our business to submit that evidence

in our principal Case. We did so fully, completely, unreservedly. If Great Britain had any evidence on which she claimed that seals were not the subject of property, or not the property of the United States, it was her duty to submit it in the same manner in her Case, fully, unreservedly and completely.

She did not do it, nor did she submit an item of evidence upon that point, but postponed the consideration of it in the manner in which I have stated. Now, therefore, having called your Honors attention to the excuse or apology, if excuse or apology it may justly be called, for withholding from the Case evidence upon that vital and important question, I will proceed with the reading of Secretary Foster's letter:—"If it were fairly to be inferred from this omission that no proofs on these important points are intended to be offered in behalf of Her Majesty's Government, no ground for criticism or objection by the Government of the United States could arise, since it is within the exclusive province of either party to determine what evidence it will submit in respect to any part of the controversy, or to refrain from submitting any evidence at all: but such inference as to the course contemplated by the British Government does not seem consistent with certain statements made by its Agent in the printed Case submitted by him". And the Secretary then goes on to refer to the statements which I have already read to the learned Arbitrators, and I will not repeat them:—"It must be evident," the Secretary continues,—"to the Government of Her Britannic Majesty that, by the provisions of the Treaty, the question whether the United States have any property interest in the seals referred to and the question what concurrent regulations in the specified contingency may be necessary, are directly submitted to the Tribunal; that the Treaty assumes that each party will or may have allegations to make and evidence to produce upon both questions; that the plain contemplation of the Treaty is that each party shall state in his Case what his propositions of law are and the evidence which will be relied upon to bring the case under them to the end that the other party may have a fair opportunity of shewing in his Counter Case that such evidence is untrue, or erroneous, or partial, or subject to qualification or explanation, for which purpose alone the provision for a Counter Case was framed. The British Agent and Counsel must well know that the decision of the two questions above referred to must depend upon the evidence produced concerning the nature and habits of the fur-seal and the methods of capturing and killing which are consistent with the preservation of the species; and that it is mainly upon these points that collision and contradiction upon matters of fact and differences in respect to matters of opinion are exhibited by the statements of persons likely to be made witnesses; that such witnesses are in many instances under the influence of prejudice and bias and, in some, open to the suspicion of insincerity and untruthfulness; and that the only way by which either party may protect itself against the consequences of falsehood or error is by having an opportunity to detect and expose it.

"The President cannot conceal his astonishment that it should be assumed that the British Government is at liberty to introduce a whole body of testimony of this character for the first time in its Counter Case and thus shut out the United States from an opportunity of detecting and exposing any errors which may be contained in it. The Government of the United States cannot fail to be aware from the correspondence that has hitherto taken place on this subject between the two Governments as well as from full information derived from the repre-

sentatives and agents of Her Majesty's Government and the Canadian Government in the course of the proceedings and discussions that have already occurred, not only that it is claimed on the part of those Governments that material evidence exists to contradict the facts asserted by the Government of the United States, but that a considerable part of it has been already taken and prepared by the British Government, as to the character, extent and weight of which, however, the Government of the United States is wholly uninformed. The propositions of law and of fact upon which the United States will rely in the Arbitration are precisely stated in its Case now in the hands of Her Majesty's Government, and need not be recapitulated here. In support of these assertions of fact a large amount of evidence, and all the evidence the Government of the United States will offer, except in rebuttal of that which may be introduced on the other side has been prepared and is printed in the United States Case and its Appendices." This letter, which is too long to read in full, and to which I commend your special attention concludes with this request: "But the President entertains the greatest confidence that when the views herein expressed are brought to the attention of Her Majesty's Government, it will hasten to correct the errors which have been made by its representatives in charge of its Case, and he is pleased to give the assurance in advance that the Government of the United States will assent to any reasonable means that may be proposed to that end by Her Majesty's Government. It is to be noted, however, that if the date fixed in the Treaty for the closing of the Counter Cases is to be observed, no time is to be lost by the British Government in submitting such proposition as may seem to it to be called for under the circumstances. It would not be possible to correct the injustice which the Government of the United States conceives has already been done by the manner in which the British Case has been made up. It was an advantage which it is conceived was not intended to be afforded to either party, that, in taking its evidence in chief, it should have the benefit of the possession of all the evidence on the other side as also that in making up the Report of its Commissioners it should first be provided with that of their colleagues representing the other Government in respect of those points upon which they have failed to agree. But this disadvantage the United States Government prefers to submit to, though quite aware of its importance, rather than that the arbitration should be put in peril.

"I have felt it necessary to enter at some length upon an exposition of the views of my Government upon this question, because of its great gravity and of the serious consequences which might result from a failure of the two Governments to agree respecting it, and because of the earnest desire of my Government to reach a mutually satisfactory settlement. I deem it proper, however, to add, in conclusion, that the Government of the United States has entire confidence in its ability to maintain its position in the controversy submitted to the Tribunal of Arbitration; but to this end it must be afforded the benefit of those substantial safeguards against the introduction of error which the judicial systems of all nations so carefully secure and which were designed to be secured by the provisions of the Treaty. In the absence of such safeguards no party to a judicial proceeding can be confident of the protection of his rights; indeed, a trial of a question of right, when one party has no opportunity of meeting and answering the allegations and evidence of the other, does not deserve the name of a judicial proceeding." I find in this passage which I have just read a matter which my learned friend Sir Charles Russell made the subject of observation

yesterday. It was the intimation by Mr. Secretary Foster that the Commissioners appointed on the part of Great Britain had waited, or might wait, and, having obtained the Report of the Commissioners appointed by the United States before they prepared their own, might prepare their own with the advantage of a previous knowledge of what the report of the United States Commissioners contained. Well, Sir Charles made the observation that he thought,—he hoped and believed—that Mr. Foster would be sorry that he had made that imputation, as he called it; and he expressed the view that it was a most serious imputation upon Her Majesty's Commissioners,—the notion that they would undertake to wait until after the Commissioners of the United States had presented their views, and then present their own with the advantage of a knowledge of the views of the United States Commissioners before them. In the opinion of my learned friend, such a line of conduct as that would be in a high degree objectionable and inconsistent with honorable sentiment, and he therefore expressed the regret that Mr. Foster had as he thought—although I do not think it is quite apparent upon Mr. Foster's statement, made such an imputation as that.

I have to say that the imputation upon the character of the Commissioners of Great Britain, if made by anybody, has been made by my learned friend, and not by Mr. Foster. If it be an objectionable thing on the part of the Commissioners of Great Britain to make up a report upon the subject committed to them, with a knowledge of what had been reported by the Commissioners of the United States and at a time when the Commissioners of the United States could not answer it—if that be an objectionable proceeding inconsistent with sentiments of honour—the Commissioners of Great Britain, allow me to say, have done it. This very Supplementary Report is made up, is it not, with full knowledge of what the Commissioners of the United States have said and with all the advantages possessed by such full knowledge. It may be said, indeed, that the United States Commissioners may now if they choose, reply to it. No, they cannot. The Government of the United States has already declared in the most solemn manner that according to its views of the interpretation of the Treaty the submission of documents for evidence of any character to this Tribunal expired long ago. They knew upon the other side that we could not answer it according to our view of the Treaty. Therefore if there is any imputation upon the conduct of the Commissioners of Great Britain, it is an imputation not made by us, but by the other side.

Now this letter of Mr. Secretary Foster was a conciliatory one offering an opportunity to Great Britain to repair as far as possible—it could not be wholly repaired—the disadvantage done to the United States by the mode in which the Case was prepared. It was responded to by Lord Rosebery on the 13th October, 1892. He proceeds in that answer to defend the manner in which the Case on the part of Great Britain had been made up and to say that the omission of evidence in relation to the nature and habit of seals was proper, that any introduction of evidence upon that point into the case would be improper, and that the introduction of evidence upon those points in the United States Case was also improper, as I understand him.

"The Government of Her Britannic Majesty" he says "can not admit that there is any foundation for these complaints, which seem to be based upon a construction of the Treaty which, in their belief and in the opinion of their advisers, is erroneous. The scheme of that Treaty provides that the five questions submitted in Article VI should be kept distinct from, and that the decision thereon should be prior to, the con-

sideration of any question of concurrent regulations, which consideration would only become necessary in the event of the five points being decided unfavourably to the claim of the United States. The sixth Article requires that a distinct decision shall be given on each of these points, while the seventh Article provides that if the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, Behring Sea, the Arbitrators shall *then* determine what concurrent regulations are necessary, and that 'to aid them in that determination, the Report of a Joint Commission, to be appointed by the respective Governments, shall be laid before them, with such other evidence as either Government may submit.' It will be noted that the seventh Article of the Treaty refers only to the Report of a Joint Commission, and it is by the ninth Article alone provided that the joint and several Reports and recommendations of the Commissioners may be submitted to the Arbitrators, 'should the contingency therefor arise.' The event therefore on the happening of which the Report or Reports and further evidence are to be submitted is thus indicated by the Treaty:—that event being the determination of the five points submitted in the sixth Article unfavourably to the claim of the United States, and so that the subject would be left in such a position that the concurrence of Great Britain would be necessary for the purpose of establishing proper regulations."

Now there is his position. His position is, that the submission of these reports, and the submission of any other evidence, bearing upon the question of regulations is not to take place until the decision of the Tribunal is made upon the first series of questions. So he declares that the insertion of evidence by the United States bearing upon these points was wholly improper. Well, what does it mean? It means that the time to submit evidence to the Tribunal upon the question of regulations does not arrive until after a decision by the Arbitrators, and that it arises then only in a certain contingency. What does that mean? That means, does it not, that there are, possibly, two distinct decisions to be made by the Tribunal. That is what it means. You must await the decision of the Tribunal on the first five questions before you can submit any evidence upon the question of regulations, and then if that decision is in a certain way, then and then only, it is in order to submit evidence upon the question of Regulations. That is the position taken. In other words, it is distinctly and squarely taking the position that there are to be *two* hearings, *two* submissions of evidence, *two* decisions, all of which my learned friend now pronounces, and justly pronounces,—I should not say it except I had his authority for it—to be nonsense, Well, what does he say in conclusion? "The Government of Her Britannic Majesty therefore reserved, and in their opinion rightly reserved. until the time contemplated by Articles VII and IX of the Treaty, the consideration of the question of concurrent regulations, should the contingency therefor arise, and Her Majesty's Government protest against the introduction, at this stage, of facts touching seal life, which they contend afford no support to the exclusive rights claimed by the United States, which were the original cause, and formed the first object of this Arbitration.

"With regard to the allegation that the United States will have no means of contradicting, limiting, or qualifying the proof and evidence adduced in the British Counter Case, the Government of the United

States appear to have overlooked the provision of Article VII, by which, with reference to the question of the concurrent regulations, express permission is given to each Government to submit other evidence". That is to say, there is provided, according to this interpretation a subsequent time, after decision by the Arbitrators, in which each Government may submit further evidence, and that subsequent time (the inference is, or the language is, I think in some parts of this paper)—that subsequent time is a matter of *procedure* to be regulated by the Tribunal of Arbitration itself; and when it comes to decide the first five questions in such a manner as to make the consideration of regulations necessary, it will then determine the time, manner and method in which the subsequent evidence is to be given, and, in such determination will, of course, afford full protection to each party as against the other.

"These are the views," he goes on to say, "of the Government of Her Britannic Majesty, and they must maintain their correctness. But the Government of the United States have expressed a different view. They have taken the position that any facts relative to the consideration of concurrent regulations should have been included in the Case on behalf of Her Britannic Majesty presented under Article III; and that the absence of any statement of such facts places the United States at a disadvantage. The Government of Her Britannic Majesty, while dissenting from this view, are desirous in every way to facilitate the progress of the Arbitration, and are, therefore, willing to furnish at once to the Government of the United States and to the Arbitrators the separate Report of the British Commissioners with its appendices. The Government of the United States are at liberty, so far as they think fit, to treat these documents as part of the Case of the Government of her Britannic Majesty".

Well, upon receiving that, it was thought on the part of the United States that it possibly, probably, furnished a way out of the difficulty,—a way not free from objection—no such way could have been found to get out of this difficulty—but still a way which, under the circumstances, ought to be accepted. If this Report of the British Commissioners with its Appendices thus promised, really contained the substance of all that Great Britain designed to rely upon in respect to matters of seal life, why the United States would have an opportunity of meeting it and of overcoming it if they could, in the Counter Case, and they therefore were disposed to accept the offer thus made of this Report with its Appendices as a reparation, so far as possible, of what they conceived to be the injustice which had been done to themselves.

Senator MORGAN.—But if you will allow me to enquire, Mr. Carter; did that Agreement between the Agents of the Government, or between the two Governments, operate to enlarge the jurisdiction and powers of this Tribunal after the Case of Great Britain had been submitted into the hands of the Arbitrators?

Mr. CARTER.—Well, that is a question, which, I do not say has not occurred to us, but which we have never thought it worth while to fully discuss, or come to any opinion about. I should hope for myself that no question would be made about it by the Arbitrators. Under the circumstances the United States Government in its capacity as a Government and through the ordinary measures of diplomatic intercourse has consented to adopt this mode of repairing what it conceives to have been an original error in the preparation of the Case. I believe it is within the power of the Government of the United States to enter into that agreement, and that it is binding upon this Tribunal of Arbitration. That is my belief.

Senator MORGAN.—Although it may alter the Treaty?

Mr. CARTER.—I do not think it does alter the Treaty in substance. It is in reference to the mode of procedure, and that is a subject as to which some margin of liberty must be allowed to the respective Governments, and, in the opinion which we have entertained, it is effective for the end. I hope it will be allowed to prove effective, and that no question will be made to the contrary. Of course, I cannot determine for any member of this Tribunal his views in relation to his duties.

Now, this Report with its appendices was, either at the time of the sending of this letter, or very soon after, submitted to the Agent of the United States.

Sir RICHARD WEBSTER.—With the letter.

Mr. CARTER.—With the letter.

General FOSTER.—It accompanied the letter.

Mr. CARTER.—It accompanied the letter; and Mr. Herbert, who had charge of the diplomatic interests of Great Britain in Washington at that time makes a report which is printed in the Appendix to the British Case, which concerns his doings in the matter. On the 9th of November, 1892, he addresses this letter to the Earl of Rosebery:—"My Lord, With reference to my telegrams of today, I called at the Department of State this morning at the request of Mr. Foster when he handed me a note containing the reply of the United States Government to your Lordships despatch of the 13th ultimo in regard to the Behring Sea Arbitration. After briefly recapitulating the principal points of this communication, copy of which I have the honour to inclose herewith, he stated that I might consider the difficulty which had arisen between the two Governments as settled, but he wished at the same time to make it clear to me that the United States Government had accepted the Report of the British Behring sea Commissioners as part of the original British Case, under the assumption that it contained all the evidence on which Her Majesty's Government intend to rely in regard to pelagic sealing and the habits of the fur-seal, and that no fresh matter relating to these subjects would be introduced into the British Counter Case except in reply to the questions raised in the United States Case."

Sir CHARLES RUSSELL.—That has been observed.

Mr. CARTER.—What has been observed, Sir Charles?

Sir CHARLES RUSSELL.—Except in so far as matters are stated in reply, the Report of the British Commissioners contains all the matters upon which we rely in regard to pelagic sealing and the habits of the fur-seal.

Mr. CARTER.—That is your view?

Sir CHARLES RUSSELL.—Yes.

Mr. CARTER.—Allow me to say that we entertain a very different view on the subject, and that the action of Her Majesty's Government is as far as possible from an observance of that understanding. Mr. Herbert continues:—"Should they, however, have been mistaken in this assumption, they intend to insist on their interpretation of the Treaty before the Tribunal of Arbitration, and to oppose the submission to the Arbitrators of any matters which might be inserted in the British Counter Case which, in the opinion of the United States, should not be justified as relevant by way of reply to their Case. I expressed my gratification at the settlement of the question, and asked him whether the United States required an extension of time c ered by your Lordship for the preparation of their Counter Case." To that statement by Mr. Secretary Foster Mr. Herbert made no

response other than that of consent to be implied from making no qualification of it. That the controversy was settled on the terms and on the understanding that the Report of the Commissioners of Great Britain with its Appendices contained all upon which the British Government intended to rely as to the nature and habits of fur seals, except so far as concerned matters which might be relevant by way of reply to what was contained in the United States Case, and no diplomatic representation to the contrary has ever been received from that written to the United States.

Now, Mr. Foster, notwithstanding this oral communication with him, addressed a further note, which was delivered on that day, and which was the subject of Mr. Herbert's observations just read,—it was that of November 9th, 1892; and it controverted Lord Rosebery's interpretation of the Treaty, and pointed out that there could not be two distinct hearings and two distinct decisions, and that all evidence of an original character intended to support the contention in chief of the respective parties should be presented in the original Case, and the Counter Case be limited to evidence in reply. All that argument he goes over in this reply, which is too long for me to read to the learned Arbitrators; but some of its closing observations I will read.

"I entirely agree with the observation of Lord Rosebery, to the effect that the right of property in fur seals depends upon questions of law; but I conceive that the precise questions of law cannot be known, and cannot, therefore, be determined, until the facts out of which they arise are known; and I cannot concur with Lord Rosebery in the view which appears to be entertained by him, that the facts concerning the nature and habits of fur-seals, and the modes by which their increase may be made subservient to the uses of man without endangering the existence of the stock, are not pertinent to the claim of the United States to a property interest. On the contrary, I regard these facts as in the highest degree important. Having thus expressed the views entertained by the Government of the United States upon the argument of Lord Rosebery in support of his interpretation of the Treaty, it remains for me to add that I am instructed by the President to say that he appreciates the spirit of equity and liberality in which Lord Rosebery, while insisting upon his own interpretation, practically, to some extent at least, and I hope fully, yields to the Government of the United States the benefit of its interpretation by furnishing to the latter the separate Report of Her Majesty's Commissioners, with the permission that the same be treated as part of the original Case on the part of Great Britain. If, as I believe and assume, this Report contains substantially all the matter which Her Majesty's Government will rely upon to support its contentions in respect to the nature and habits of fur-seals, and the modes of capturing them I entertain a confident hope that all further difficulty upon the questions discussed in this note may be avoided. I deem it necessary, however, to say that the Government of the United States will, should occasion arise, firmly insist upon its interpretation of the Treaty, and that it reserves the right to protest against and oppose the submission to, and reception by the Arbitrators of any matter which may be inserted in the British Counter Case which may not be justified as relevant by way of reply to the case of the United States".

Well, that I submit to the learned Arbitrators seemed to place the question in this condition. A great advantage as we claim had been taken over the United States by Great Britain in the manner in which the Case on the part of Great Britain had been made out. That advan-

tage she could not be wholly deprived of, but it might be reduced if the United States were then furnished with all the evidence upon which she intended to rely to support her contention in regard to the nature and habits of the seals. This Report of the British Commissioners with its appendices was submitted to the United States as being all that they intended to rely upon, except what they were permitted to rely upon by way of reply, and accepted by the United States in that sense, and I think we are justified in saying there was a pretty well understood agreement entered into that the Counter Case of Great Britain would contain no new evidence upon the nature and habits of seals of a character which would have supported the original contention and which would properly have found a place in the original Case of Great Britain.

Now I come to the reception of the Counter Case. In due time the Counter Case on the part of Great Britain arrived and was examined by us and what did we find? That it contained no new evidence in addition to that furnished by the Report of the British Commissioners and its Appendices in relation to the nature and habits of the fur seal? Far otherwise! It had reams of evidence directly bearing on their nature and habits; it had depositions almost without number concerning the nature and habits of the fur seals. Some of these depositions and evidence, bore upon their face that they had been in the possession of Great Britain long before the original Case had been submitted to us. Others were of a different character; but almost the whole of it was evidence which would have been perfectly competent to have been put into the original Case, because it was perfectly germane to the contention by Great Britain as to the nature and habits of the fur seals.

Everything, of course, in relation to the nature and habits of the fur seals, everything tending to shew at what time they come upon the Islands, how long they remain there, the course of their migration, whether they come back or not, or, whether, when the females go out upon Behring sea they go out for the purpose of food, and how often they go, all those things are pertinent and relevant to the question of property, and will be alluded to, I venture to say, over and over again when that question comes to be discussed, as substantiating the views of Great Britain on that question of property. They are in no sense new matter in reply to the evidence furnished by the United States in its original case. There is a large amount of matter in the nature of reply there. There is a large amount of matter of that character; but the bulk consists of original evidence in respect to the nature and habits of the fur seal, which ought to have been inserted by Great Britain in its original Case if it intended to rely upon it at all. This matter in reply was matter tending to impeach our evidence. That, of course, is strictly evidence in reply. Numerous affidavits are in the British Counter Case tending to shew that the witnesses we called, and whose depositions were contained in our original Case were not to be believed upon oath, or that they had not made the statements which they were represented in our Case to have made.

The advantage which they had gained by the manner of making up this case had been improved to the utmost. The Pacific Ocean through 30° of latitude had been scoured to enable them to impeach *our* evidence. We could not do that in respect to their evidence because we did not have it. I do not complain of this replying evidence in the British Counter Case. It was the advantage which they had gained by their mode of making up their Case. We supposed that we had settled it, but settled it upon the basis that no evidence other than that contained

in the Report of the British Commissioners should be received. Well, we felt injured when we found that a contrary course had been adopted. My learned friend has spoken about an eagerness on our part to shew a grievance. I admit we felt one. We felt one at each of these steps which I have been describing. We could not feel otherwise; and I submit it to the candor of every Gentleman upon this Tribunal whether we were not justified in having that sentiment of grievance. We did feel it. But what were we to do? There was only one course left to us, and that was the one which we indicated in the correspondence we would take. And that was, that when the Tribunal met we might move to strike out all matter which ought to have been inserted in the original Case. We have not done that. Why have we not done that? Well, there are several reasons for that. We could make an overwhelming case calling upon this Tribunal to reject that matter. But what would be the consequence of that? One of two things. Great Britain might withdraw from this Arbitration if she could. It is a question if she could not even then. But, if she could not do that, an appeal would of course be made to the Tribunal to allow the evidence which had been thus irregularly introduced to be in form presented. That would involve a delay,—a postponement,—a very long postponement for the purpose of enabling them to put themselves *recti in curia*. Well, we cannot afford to delay. These poor seals are suffering, or will suffer, when the *modus vivendi* terminates, and we are very desirous to obtain a decision of this Tribunal before the race shall be left again to the mercy of pelagic sealing sealers? If the Tribunal should strike out the matter and then require the Arbitration to proceed, the representatives of Great Britain could not complain of such a decision. The difficulty would be one they had brought upon themselves, and without fault upon our part, and the consequences might be justly left to fall upon them. But we know the indisposition of a Judicial Tribunal desirous of administering justice in a controversy, to go to the final determination of it when they feel it to be true, from whatever cause, that all the materials to which they could properly look to ascertain the truth are not before them.

No Tribunal intent upon the business of administering substantial justice ever enters upon a task of that sort except reluctantly, and I feel bound to say also that, so far as I am concerned, nothing is more disagreeable to me—I think it is so with every lawyer—to go into contention with a crippled adversary, no matter on what ground that adversary has been crippled. And, thinking that, after all, the truth in reference to the nature and habits of the fur-seals was established on the whole by such a weight of testimony that it could not be seriously affected, and that the most important interests would not be imperilled, we concluded to waive our objections to this testimony thus wrongfully introduced, and to let it stand in the Counter Case for what it was worth, subject however to that sort of comment which we are entitled to make in reference to it whenever upon the main argument the question arises as to the confidence and weight to which it is entitled.

There was one particular, however, in which we felt bound to make a motion, and we did make it, and that was to dismiss from the attention of the Tribunal so much of the matter contained in the Counter Case of Her Majesty's Government as related to new claims for damages as to which no mention was made in the original Case. That motion was made, and was brought on by us at the same time with the one which I am now arguing; but, at the suggestion and under the direction of the President, the hearing of it was deferred.

Now, that, may it please the Arbitrators, is an account—I think a just account—of the manner in which these Cases have been made up and of the respective theories of the parties in making them up. The theory of interpretation upon which the representatives of Great Britain have thus far proceeded, is this: That the original Cases are to contain nothing upon the subject of Regulations until the Tribunal has determined that it is necessary to enter into the consideration of that subject by a determination of the questions of exclusive jurisdiction in such a manner that the concurrence of Great Britain is necessary to regulations to preserve the fur-seal; that when they have made that determination, and not till then, is it proper that any evidence bearing upon the question of regulations should be submitted to the Tribunal. That has been the British contention up to the time of the present argument. That is the ground assumed in the Cases and in the Counter Cases on the part of Great Britain. That is the ground taken by Lord Rosebery in his argument; and it is a necessary consequence of that theory that there are to be two hearings, two decisions, two awards, although the Treaty makes provision but for one hearing, one decision, one award; and I want to call your attention here to the position which has been taken in the British Counter Case. I have read from the Case and I have read from the diplomatic communications to show that that was the position of Great Britain up to the time of their delivery of the Counter Case. I have not read anything showing that it continued to be their position after that time. I now call the attention of the Tribunal to the British Counter Case, and what is said upon page 3—

> The subject of the regulations (if any) which are necessary and the waters over which the regulations shall extend, referred to in Article VII of the Treaty, is considered in Part II. For reasons more explicitly stated in correspondence which will be found in the Appendix.—

(That is the Rosebery and Foster correspondence.—)

> For reasons more explicitly stated in correspondence which will be found in the Appendix, the consideration of this point has been treated in this Counter Case, but only in deference to the wish expressedby the United States that argument upon all the questions with which the Arbitrators may have to deal should be placed before the Tribunal by means of the Case and Counter Case.

That is not a correct representation of any wish ever expressed by the United States, or of any views expressed by the United States. The views expressed by the United States were that all original evidence upon the question of regulations should go into the Case, and not into the Counter Case.

Lord Rosebery continues: "The Government of Her Britannic Majesty have adduced these arguments under protest, without prejudice to their contention that the Arbitrators cannot enter upon or consider the question of the proposed international regulations until they have adjudicated upon the five questions enumerated in Article VI upon which they are by the terms of the Treaty required to give a distinct decision; and upon the determination of which alone depends the question whether they shall enter upon the subject of regulations. Her Majesty's Government reserve also their right to adduce further evidence on this subject, should the nature of the arguments contained in the Counter Case on behalf of the United States render such a course necessary or expedient."

The Tribunal will observe that the learned counsel for Great Britain now repeat their adhesion to the interpretation contained in the Rosebery correspondence, that it is not regular or legitimate, or permissible,

to submit the evidence upon the subject of regulations to the Tribunal until after the decision upon the points mentioned in regard to the exclusive jurisdiction over Behring sea. That is their position still.

My learned friend, in the course of his argument yesterday, I think, in speaking of the course which Her Majesty's Agent had pursued in the matter, said: "Why, we did it in good faith; we did all of this in good faith. You don't deny that, do you? We told you about it"; And he read this extract from their Counter Case, apprising us of their interpretation: (Mr. Carter read the passage).

Sir RICHARD WEBSTER.—We also mention it at page 166 D in the Counter Case.

Mr. CARTER.—Would you like me to read anything there?

Sir RICHARD WEBSTER.—No; I merely meant that there is a distinct reference to this particular document.

Mr. CARTER.—Do I charge bad faith in this matter? I have undertaken to avoid it. Do I really believe that Her Majesty's Agent and his advisers when they came to prepare the Case of Great Britain in this important controversy, said to themselves in effect: "We will teach these Yankee lawyers a trick worth knowing in regard to the manner in which the Case may be made up, whereby we can get the opportunity of answering their allegations and evidence and deprive them of the opportunity of answering ours." Do I believe that these gentlemen concocted any such scheme as that? No; I don't believe it. I would not believe it. No consideration would induce me to believe it. I do not think it. I cannot help saying that I think they have acted under an erroneous impression as to the interpretation of the Treaty; and I cannot think that they gave to the interpretation of the Treaty that study which its importance demands.

But the question of good faith or bad faith is wholly unimportant as far as the results are concerned. The advantage in either case, they got. It does not diminish the magnitude of the advantage which they derive from the course which they took that they did not contrive for it. The advantage which they gained is as great, whatever view may be taken of that matter.

So also they say: "Why, we told you that we did it." Of course it was not necessary for them to tell us they had done it, when we looked into their Case and saw it did not contain a single word in reference to the nature and habits of the fur-seal, and contemplated the possibility that they might fill their Counter Case with evidence of that character. We saw that they had gained their advantage, and it was not necessary for them to tell us so.

If they were going to make the case any better by telling us anything about it, the time to have told us about it was before the time for the exchange of the Cases. That was the time. We might then have considered how we would make up *our* Case if they proposed to make up theirs in that manner.

Now, my learned friend has re-stated the interpretation of Great Britain. Upon that interpretation I am going to make, not many observations, but a few, for the purpose to some extent, of showing that they are entirely erroneous. The learned counsel, has dispensed with the necessity, for he says that in part at least, it is erroneous. He says that the notion of two hearings and two decisions is nonsense. He says it is nonsense. I have not said that. Those are his own words in reference to it. But I wish to show that it is entirely erroneous.

In the first place, what is the question? The question is as to the time and the manner in which evidence is to be submitted to the Arbi-

trators. It is not a question at all as to the time or the manner in which the Arbitrators are to determine any of the questions submitted to them under the Treaty. That is another matter.

In the first place, there is *one* Case provided for, and *only one;* there is *one* Counter Case provided for, and *only one;* and that is the only mode provided for by the Treaty in which evidence can be submitted at all.

In the next place, there is a written argument provided for, and only *one.* In the next place, *a hearing* is provided for, and the day fixed for it, and *only one* hearing. In the next place, *an award* is provided for, and *only one* award.

It is entirely manifest, therefore, that there is to be but *one* decision in this Arbitration. The evidence is now all before the Tribunal. It is in part argued in writing. It will be fully argued orally. The Tribunal will retire for the purpose of decision; they will proceed, in the first place, I suppose, to decide the first five questions submitted by the Treaty. If their decision leaves the subject in such condition that no Regulations are necessary for the preservation of the fur-seal, they will not consider any Regulations at all, but make up their decision upon the questions which they do decide, and publish it by their award. If, however, their decision should be of a character to make it necessary to go into the question of Regulations, they will go into the question of regulations; and whenever they determine them they will include in their award the decision upon the five first questions submitted to them, and also the Regulations which they determine upon and establish, and that all at one time, and in one document, by one instrument, one act.

That will be the course of things. Now we come to see what is the contention upon the other side and what there is to support that. Article VII contains the first thing which they rely upon:

"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such a position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea, the Arbitrators shall then determine what concurrent regulations outside of the jurisdictional limits of the respective Governments are necessary."

That creates no difficulty. It says that the Arbitrators "shall *then determine.*" It does not say that the Arbitrators shall *then proceed to receive evidence;* nor does it intimate it.

The PRESIDENT.—Do you not think the word "then" covers the same ground? "Shall then determine the concurrent Regulations, and to aid them in that determination, the report of the joint commission to be appointed shall be laid before them." I mean to say does not the word "then" apply to the latter part of the phrase so that it means "Shall then be laid before them"?

Mr. CARTER.—That would be putting in another "then"?

The PRESIDENT.—No; I mean to say do you not think the word "then" covers both parts of the phrase? I ask for your opinion.

Mr. CARTER.—I don't think it does at all. By grammatical position the word "then" does not belong there. If we could gather from the Treaty generally that there was to be a separate decision upon the first five questions, and then a reception of evidence upon this point of regulations; if we could gather from the Treaty generally any evidence that that was the purpose and object of the parties, then certainly the word "then" would qualify the whole matter; but as the Treaty is written it is repugnant to it.

The PRESIDENT.—That is your point.

Mr. CARTER.—Yes. It is plainly repugnant. If you make it qualify that matter, then you have got to have *two* submissions of evidence, *two* hearings, *two* decisions, and *two* awards. That is a necessity. Well, now, that is precluded absolutely by the Treaty; and we have rules of law that whenever the general purpose and spirit of an agreement—and a Treaty is an agreement—is manifest, and there is some particular clause which is ambiguous, and which may be read one way, or may be read another way, you must read it in accordance with the general purpose and spirit of the agreement. Therefore I say at once, as this language does not in terms require that the evidence should then be submitted, we must read it in accordance with these other provisions of the Treaty, which do require that there shall be but *one* hearing and *one* submission of evidence.

The PRESIDENT.—Perhaps it would be well to suspend your argument until tomorrow.

Mr. CARTER.—I shall have occasion to occupy a little further time, not long, I hope.

The Tribunal thereupon adjourned until tomorrow, Friday, April 7th, 1893, at 11:30 a. m.

SIXTH DAY, APRIL 7TH, 1893.

The PRESIDENT.—Will you please to continue your argument, Mr. Carter?

Mr. CARTER.—Mr. President, my argument yesterday was very largely confined to a history and a description of the modes in which the Case and Counter Case had been prepared, of the different views of the parties respecting the interpretation of the Treaty upon the point as to how they should be prepared. The efforts which had been made to accommodate those differences of opinion, the hope which had been entertained that those differences had been accommodated, the failure of that hope, all of which have been subjects of debate by Counsel who have preceded me, and all of which have a bearing, although not a vital bearing, on the immediate question before the Tribunal.

Near the close of the session, however, I was dealing particularly with the support which is supposed by Counsel for Great Britain to be given for their interpretation of the Treaty in the language of the seventh Article. That is the subject, therefore, upon which I shall resume my line of argument, and as it may not be fully in the minds of the Arbitrators, I shall again read the Article and state the contention which is built upon it by the Counsel for Great Britain. "If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination the Report of a Joint Commission, to be appointed by the respective Governments, shall be laid before them, with such other evidence as either Government may submit."

The suggestion is, the contention is, that this means that the Report of the joint Commissioners thus referred to and the other evidence thus referred to are to be laid before the Tribunal after the decision to which it shall have arrived and not before. . I stated at the time, that, *upon the face of the Article*, there was nothing at all unreasonable in that suggestion, and that it might possibly be so; but when you fully consider the character and consequences of that interpretation, it seems to be wholly inadmissible for these reasons.—First, it supposes that there are to be two decisions by the Tribunal: first a decision upon the questions as to the exclusive jurisdiction of the United States, and then a decision upon the subject of regulations; and if two decisions, then two awards, all of which is in direct repugnance to the terms of the Treaty. In the next place, it supposes that a part of the evidence in the Case, and I may add, and should add, by far the most important evidence in the Case—more important in the sense that it is the only part of the evidence which is disputable—that the disputable part of

the evidence is to be laid before the Tribunal at some future time and in a manner for which the Treaty makes no distinct provision whatever. It appears upon the face of the Treaty that most careful provision was made for the submission of evidence to each party by the other, to the end that they should have an opportunity of answering it. We have already seen that the only disputable part of the evidence, the only part upon which it is to be apprehended that there is to be any considerable dispute, and, therefore, the only part which there is any necessity for answering, is in reference to the nature and habits of the seal, and seal life, and so forth. Now, the contention on the other side is that, as to the part as to which there is no importance in having an opportunity for reply, most careful provision is made for giving an opportunity for reply; but, as to that part of the case where the evidence is likely to be contradicted and, therefore, as to which there is particular and special necessity for an opportunity for reply, the Treaty has failed to make any provision. That is so unreasonable, so contrary to the purposes of the parties, that it seems to me it should be immediately rejected, unless the language of the Article is so distinct and unequivocal as to leave no room for doubt. When we look at the language of the Article, we perceive that it is not so distinct and unequivocal, for it does not say that this Report of the Commissioners and other evidence shall *then* be laid before the Arbitrators, but simply that it shall be laid before the Arbitrators, and the question of the time when it is to be laid before the Arbitrators is left undetermined and unexpressed by the Article. How, then, are we to determine the time when this disputable evidence is to be submitted? How are we to determine that? By looking to the purpose and spirit of the Treaty; and when we find that distinct provision has been made for the introduction of evidence, distinct provision made for giving the two sides an opportunity each to answer the evidence and allegations of the other, we must at once come to the conclusion, as I respectfully submit, that that is the method and that is the time when this evidence is to be submitted. So much for that. It seems to me that those observations effectually dispose of any support, or of any supposed support, which may be furnished to the contention of Great Britain by the language of the Article VII.

But that is not all their argument. They then refer to the language of Article IX and they conceive that that furnishes them strong support to their contention. I will now read Article IX. "The High Contracting Parties have agreed to appoint two Commissioners on the part of each Government to make the joint investigation and Report contemplated in the preceding Article VII, and to include the terms of the said Agreement in the present Convention, to the end that the joint and several Reports and recommendations of said Commissioners may be in due form submitted to the Arbitrators, should the contingency therefor arise, the said Agreement is accordingly herein included as follows": And then the Agreement is stated and it is further added: "These reports shall not be made public until they shall be submitted to the Arbitrators, or it shall appear that the contingency of their being used by the Arbitrators cannot arise." The learned Arbitrators will perceive that "contingency" is here used in two places, and it is insisted by our friends on the other side that that word "contingency" refers to the contingency mentioned (although not mentioned by the use of that very word), in Article VII, namely, the contingency that the Tribunal shall decide the questions, as to the exclusive jurisdiction in such a manner as to leave the subject in a condition which would

make it necessary to consider the question of concurrent Regulations. They put that interpretation upon the word "contingency". That, allow me to say is not unnatural, nor will I say it is unreasonable. We naturally look for the explanation of any word in any agreement to some other part of the agreement, and when there is a contingency expressed in the seventh Article, they infer that that is the contingency mentioned. But is it so? Well now, we must not take it that it is so, and thus draw upon ourselves all the consequences, the inadmissible and unjust consequences, which I have already mentioned, unless there is no other explanation of that word "contingency". If there is any other explanation of that word "contingency", which is consistent with the main purpose and object of the Treaty—consistent with its prime condition, that the parties shall have an opportunity to answer the evidence and allegations of each other,—we must adopt such other interpretation. What I shall now have the honor to submit to you is that there is another contingency, and a contingency which is referred to by this ninth Article, and that the contingency mentioned in the seventh Article is the one intended. To make my meaning clear on this point it is necessary for me to make a brief recital. In the negotiations and correspondence between the parties, diplomatically, which led to the adoption of this Treaty of Arbitration, there were at all times two main objects in view. The whole scheme of a settlement of this controversy wore from the beginning, and preserved until the last, two aspects quite distinct. The first aspect was that an effort should be made to settle the entire controversy by convention, and without Arbitration; the second aspect was that, in case of the failure of that effort, Arbitration should be resorted to.

To make that clear, I must have recourse to the first occasion, in the course of the diplomatic correspondence, in which this settlement by Arbitration was referred to; and I call attention to the note of Sir Julian Pauncefote to Mr. Blaine, of April 29th, 1890, which is contained in the Appendix, volume III of the British Case, at page 455. "Washington, April 29th, 1890. Dear Mr. Blaine. At the last sitting of the Conference on the Behring Sea Fisheries question, you expressed doubts, after reading the memorandum of the Canadian Minister of Marine and Fisheries, which, by your courtesy, has since been printed, whether any arrangement could be arrived at that would be satisfactory to Canada." I should state here that the negotiations had been proceeding between the parties at that time for a very considerable period, and efforts for adjustment had been made. The obstacle was the objection of Canada. Proposals had been made by the United States for a settlement, and had been, provisionally at least, acceded to by Lord Salisbury. The conclusion of them had been interrupted by the objections of Canada, and Mr. Blaine here expressed the doubt whether these objections of Canada could ever be removed. Well, in order to answer that objection, Sir Julian Pauncefote proposes, and proposes for the first time, a scheme of settling the controversy which, presumably, as it came from him in answer to that suggestion on the part of Mr. Blaine, would be satisfactory to Canada.

He continues:—"You observed that the proposal of the United States had now been two years before Her Majesty's Government, that there was nothing further to urge in support of it, and you invited me to make a counter-proposal on your behalf". He says "your", but one would suppose it should be "my". "To that task I have most earnestly applied myself, and while fully sensible of its great difficulty, owing to the conflict of opinion and of testimony which has manifested

itself in the course of our discussions, I do not despair of arriving at a solution which will be satisfactory to all the Governments concerned". He then goes on to say that this scheme he has prepared and submits in an inclosure, and that inclosure is to be found on page 457. It is entitled:—"Draft Convention between Great Britain, Russia and the United States of America, in relation to the fur-seal Fishery in the Behring's Sea, the sea of Ochotsk, and the adjoining waters". "Article I. The High Contracting Parties agree to appoint a mixed Commission of Experts."—here is the first occasion of the suggestion of this Commission of Experts—"who shall inquire fully into the subject, and report to the High Contracting Parties within two years from the date of this Convention the result of their investigations, together with their opinions and recommendations on the following questions:—1. Whether Regulations properly enforced upon the breeding islands (Robin island in the sea of Ochotsk, and the Commander islands and the Pribiloff islands, in the Behring's Sea) and in the territorial waters surrounding those islands, are sufficient for the preservation of the fur-seal species. 2. If not, how far from the islands is it necessary that such Regulations should be enforced in order to preserve the species? 3. In either of the above cases, what should such Regulations provide? 4. If a close season is required on the breeding islands as well, what extent of waters and what period or periods should it embrace?"

The Commissioners were to be appointed to report for the information of the Governments on those points, and they were to be experts. "Article II. On receipt of the Report of the Commission, and of any separate Reports which may be made by individual Commissioners, the High Contracting Parties will proceed forthwith to determine what International Regulations, if any, are necessary for the purpose aforesaid, and any Regulations so agreed upon shall be embodied in a further Convention, to which the accession of the other Powers shall be invited." Now the next stage was to endeavour to come to an agreement upon the basis of such Report. "Article III. In case the High Contracting Parties should be unable to agree upon the Regulations to be adopted, the questions in difference shall be referred to the arbitration of an impartial Government, who shall duly consider the Reports hereinbefore mentioned, and whose award shall be final, and shall determine the conditions of the further Convention." As the original suggestion of the whole scheme thus finally came to the form and shape in which it now stands, what did it contemplate?

The PRESIDENT.—May I ask the gentlemen of the United States whether Russia, which was supposed to be a party in this intended Convention, took part in those negotiations?

Mr. CARTER.—Russia was to a certain extent consulted; and it will appear on the face of this suggested scheme that the contemplation was that Russia should be brought in. I could not say now, because I cannot state with accuracy, how far Russia was at that time an actual participating party, or only whether at this time it was contemplated that she should be made a participating party.

The PRESIDENT.—Mr. Foster might be perhaps aware, and could tell us whether the draft of the Convention was communicated in fact to Russia, or whether it was a draft that remained between the United States and England, because then, of course, it would have much less authority, I might say.

Mr. FOSTER.—I am not prepared at this moment to give an explicit answer. I was not at that time Secretary of State, and I could only, therefore, make a reply from my knowledge of the correspondence. I

know that previous to this date, a few months previous, the British Minister, the Russian Minister and the then Secretary of State, Mr. Blaine, were in active and frequent conference on this subject. I shall have to refresh my memory as to the precise date of their conference in connection with this matter, and I am not, therefore, prepared at this time to give an explicit answer as to whether this particular proposition was formally submitted to the Russian Minister or not. That can at a later stage, before the discussion closes, be answered.

Sir CHARLES RUSSELL.—I may say, Sir, that I am in a position to state to the Tribunal what the facts were on this point. It was contemplated, as the concluding Article shows, that the accession of other Powers should be invited to the Convention; and there were communications with other Powers, but no other Power became a party to the Convention.

The PRESIDENT.—You will see that this is not a Convention but a draft of a Convention; and the purport of my interrogation was this. The authority of the draft, which is submitted to us by Mr. Carter, and used as a part of his argument, will have more or less to be taken into consideration according to the stage of diplomatic proceedings which it indicates. Of course, if it had been communicated to Russia, Mr. Phelps as a Diplomatist would certainly acknowledge that it would have had more consistency, and, consequently, more importance, than if it was merely a sort of informal draft or a sort of continuation of private conversations between the American and English Governments, or their representatives.

Mr. PHELPS.—My learned friend is right in saying that at no time in the progress of these negotiations was any Convention actually entered into between the United States and Russia: nor did Russia become formally a party to any convention between the United States and Great Britain; but in the years 1887 and 1888 at any rate, when these negotiations were first commenced on this subject, the representatives of Russia in London, as the correspondence that is before you shows (though I cannot at this moment refer you to the particular pages), were invited to participate and did participate and gave informally their sanction to the Agreement and their promise to join it if it should be consummated, but as it never was consummated at any time, that fell through. The correspondence, as I have said,—the diplomatic correspondence—during those years will prove that. How it was as late as 1890, I am at this moment unable to say,—whether there was any correspondence with Russia at that time or not.

Sir RICHARD WEBSTER.—Might I point out, Sir, that the draft Convention, as to which you have asked the question, is the one submitted in the year 1890, as Mr. Phelps points out, long after the date he refers to of communications with Russia. Whatever may have passed with reference to communications upon other matters, it will be found in the correspondence that that draft Convention was not submitted to Russia, nor were they asked to become parties to that; and I think it will appear from the concluding words of Article 12 of that draft, that "The High Contracting Parties agree to invite the accession of the other Powers to the present Convention"—I think it will be found, when the correspondence is traced, that the draft Convention was not submitted to Russia.

Mr. PHELPS.—I may say, Sir, that we will have references prepared and submitted to the Tribunal as to this correspondence on either side.

The PRESIDENT.—However, it was drawn up in such a way as to suppose that Russia would be a party, so that the other parties, to

which Sir Richard Webster alluded, would be parties other than Russia. It was to be a Convention between three parties.

Mr. PHELPS.—There was a correspondence between Mr. Bayard, who was then Secretary of State of the United States, and various other Powers on this subject,—Japan, Germany, and some others. So that the United States from the character of their replies had a right to expect, if they were fortunate enough to conclude a Convention with Great Britain, that the adhesion of these other Powers would be given. It was contemplated by both parties that the adhesion would take place, if that was ratified between Great Britain and the United States.

The PRESIDENT.—And Russia?

Mr. PHELPS.—And Russia.

Sir CHARLES RUSSELL.—This is really very wide of the mark.

The PRESIDENT.—My question was perhaps rather more a diplomatic than a judicial one; but my diplomatic colleagues will not be surprised at the importance I attach to these details, because they know by the practice of diplomatic life that a Convention would scarcely be prepared by two parties when it is to result in a Convention between three. There is a certain difference which my diplomatic colleagues on the Arbitration will understand; and that was the purport of my observation.

Mr. CARTER.—Permit me to say, Sir, that the interrogatory you have been pleased to address to us and the various answers given to it may become at some time interesting at least, if not important—to know how far Russia did participate in the negotiations in reference to a Treaty—how far she was expected to participate, and when all such participation ceased. For the present, however, I do not think those enquiries are material; and, for the object for which I call the attention of the Tribunal to the proposed draft Convention, they are wholly, as I conceive, immaterial. The purpose which I have in view is to call the attention of the Tribunal to the first suggestion of a settlement of this controversy through the combined instrumentality of a joint Commission and an Arbitration.

The PRESIDENT.—In order to exhaust this, although Mr. Carter does not find it quite material to the point, I would beg permission to remind him of an extract from the despatch of Sir Julian Pauncefote to Mr. Blaine received on April the 30th. It is in the appendix of the Case of the United States, Vol. I, page 206—the last paragraph of page 206. Sir Julian Pauncefote says: "I have, out of a deference to your views and to the wishes of the Russian Minister, adopted the Fishery line described in Article V"—it is quite another object, but it proves that at that time there was a communication with Russia—"and which was suggested by you at the outset of our negotiations. The draft, of course contemplates the conclusion of a further Convention after full examination of the Report of the mixed Commission. It also makes provisions for the ultimate settlement by Arbitration of any differences which the report of the Commission may still fail to adjust." That is the draft Convention which you were alluding to.

Mr. CARTER.—It is.

The PRESIDENT.—It is the same draft.

Mr. CARTER.—It is.

The PRESIDENT.—That proves that you were in communication with Russia more than you thought yourself. That observation is rather an advantage to you.

Mr. CARTER.—We may have been in the most intimate and daily communication with Russia for all I know, but whether that be so or not, it is foreign to the purpose of my enquiry.

The PRESIDENT.—Well, perhaps not quite so; because it alludes to the document and refers to it and therefore gives it, more authority in a diplomatic point of view at any rate, although not perhaps from a judicial point of view.

Mr. CARTER.—What I am now on is to know the meaning of the word "contingency" in the Article IX of the Treaty between the United States and Great Britain. Allow me to repeat, therefore, that the first suggestion, so far as I am aware, of the scheme of settling this controversy through the joint instrumentality of a Commission and of Arbitration is to be found in this note of Sir Julian Pauncefote, and that scheme you will perceive is this. It contemplates the appointment of a Commission of Experts to inquire into the whole business of seal life and to report upon the question of Regulations. It contemplates, in the next place, the probability that when that report is received by the two Governments they can conclude without difficulty and without any further instrumentality a Convention for the purpose of preserving seal life by Regulations. It contemplates in the next place, that is to say, in the contingency that they should not be able to agree, that the questions as to which they should disagree should be settled by the Arbitration of an impartial Government—that was the sort of Arbitration then thought of.

The learned Arbitrators will bear in mind, therefore, that the Arbitration thus foreshadowed at this early period was solely confined to the question of Regulations necessary to preserve seal life. It was to have nothing to do with Russian pretensions of dominion in Behring sea,—nothing to do with the pretensions of the United States as to dominion in Behring sea,—nothing to do with any question of property in the United States in the seals, but had solely to do with the question of what regulations might be necessary for the purpose of preserving the race of seals. That was the sort of Arbitration proposed, and it was to be limited to that.

According to that scheme, therefore, if the two Governments came to an agreement on the basis of the Reports, that would be an end of the whole business, and there would be no Arbitration, although it was proposed by the Convention that an Arbitration should be provided for, to spring into operation in the case of an inability of the two Governments to agree, and then to decide as to what Regulations should be needed. That was the scheme. You will perceive, therefore, that the Reports of this Commission would be laid before the arbitration of an impartial Government in the contingency, and only in the contingency, that the Governments should fail to come to a settlement of the controversy by Convention based upon those Reports. Therefore, at the very outset of these negotiations there was a double aspect to the scheme of settlement: (1), an effort to settle without Arbitration; (2), a provision for calling the powers of an Arbitration into operation in case of a failure of that effort, and it was only in the contingency of such failure that any use would be made of these Reports of the Joint Commission in any Arbitration. Now, that double aspect thus stamped upon this scheme of settlement at the start has been preserved all through the negotiations and is still preserved in this Treaty. In the course of the negotiations, and they were quite long, and many difficulties were encountered before the thing was got into actual shape, the scope of the suggested Arbitration was greatly enlarged. Instead of being confined to the question of Regulations for the preservation of fur seals, it was to include questions as to the exclusive jurisdiction in the United States in Behring sea, questions as to the property of the United States

in the fur seals, not embraced in the original suggestion,—the scope of the Arbitration was enlarged, but it was still contemplated, although an Arbitration was agreed upon and provided for, that it might never have to be resorted to, and would not be resorted to if the parties should come to an agreement by Convention. If the Joint Commissioners should report to the two Governments, and the two Governments should find themselves able to come to an agreement in respect to Regulations, why then the contemplation was that this Arbitration should not be carried forward. Of course it would be idle, preposterous indeed, to carry it forward after the whole controversy had been settled by the parties,—to call upon Arbitrators to determine what rights there were between the parties when they had made a settlement with each other that dispensed with the necessity of enquiring into rights at all.

Now we find that, when they assumed final shape, the Agreement for the Arbitration and the Agreement for the appointment of the Joint Commissioners were separate. They were signed separately before the Treaty was finally brought out, and those separate instruments thus separately signed are found upon page 9 of the Appendix to the British Counter Case, Volume I. This is the text of the Agreement for the Joint Commission. "Each Government shall appoint two Commissioners to investigate, conjointly with the Commissioners of the other Government, all the facts having relation to seal life in Behring sea, and the measures necessary for its proper protection and preservation. The four Commissioners shall, so far as they may be able to agree, make a joint Report to each of the two Governments; and they shall also report, either jointly or severally, to each Government on any points upon which they may be unable to agree. These Reports shall not be made public until they shall be submitted to the Arbitrators, or it shall appear that the contingency of their being used by the Arbitrators cannot arise." Now, this word "contingency" occurs there. What is that contingency? Why, it is the same contingency contemplated by the scheme of Sir Julian Pauncefote; that is, the contingency that the Government shall not be able to come to an agreement by Convention, which should settle this matter without the intervention of an Arbitration.

Mr. Justice HARLAN.—Do you recall, Mr. Carter, just here, on what date the Governments informally agreed upon those terms for a Joint Commission?

Mr. CARTER.—I cannot, Sir.

The PRESIDENT.—Article IX refers to an agreement.

Mr. CARTER.—I cannot do that now, Sir; but I shall very presently refer to evidence which will give you some information upon that point.

The PRESIDENT.—Was the agreement by which the Governments agreed upon a Joint Investigation and Report, the object of a formal convention, or was it merely an "unofficial" agreement?

Mr. Justice HARLAN.—I have a general recollection, from looking at the documents before this hearing was commenced, that the terms for this Commission, just as they appear in Article IX, were assented to by the two Governments as early as July, 1891.

Mr. CARTER.—I shall be able to show that they were assented to before that.

Senator MORGAN.—I would like to enquire, from anyone who has the information, whether these Commissioners had not, in fact, made their examinations and completed their labors on the Pribilof Islands before this Treaty was signed?

Mr. CARTER.—Well, they had been appointed long before that. How far they had proceeded with their labors I cannot say; but the matter

which I am going immediately to call the attention of the learned Arbitrators to will throw light upon that point, if they will allow me to proceed.—I am informed by Mr. Foster that they had, at the time that the Treaty was actually ratified, completed their labors.

Mr. FOSTER.—That is, labors of investigation in the field.

Senator MORGAN.—I beg leave to say that it came to my attention personally, as a member of the Senate of the United States, that the Commissioners had been investigating the subject before the Treaty was actually signed; but now, whether that appears upon the Cases anywhere, or not, I do not know.

Mr. CARTER.—Well, I am going to show it, if the learned Arbitrator will allow me. What has been said shows, and I suppose that I may appeal to the diplomatic knowledge of the President to the effect that agreements between two Governments, which it is contemplated will be eventually put in the form of a Treaty and regularly ratified, and which agreements can have no vital force until they are so incorporated in a Treaty, are, nevertheless, in many cases made long before the Treaty, and acted upon long before the Treaty, it being supposed by both parties that they have come to such a conclusion upon all the details that there will be no difficulty in procuring the settlement of the Treaty and its ratification. That took place here. This Treaty is dated on the 29th February, 1892, and so far as an actual binding obligation, evidenced by a formal Treaty, goes for the appointment of these Commissioners, none existed until February, 1892, and yet you find that on the 24th June, 1891, the Marquis of Salisbury appointed Sir George Baden-Powell and Dr. Dawson Her Majesty's Commissioners, to proceed to Behring Sea and make these proposed investigations, and they went immediately thereafter and engaged in the work, and an actual commission was issued to them, as you will observe.

Senator MORGAN.—I wish to enquire, Mr. Carter, if you will allow me, whether their Report which is embraced in the British Case was based upon that investigation?

Mr. CARTER.—It was. That very Report is the one based upon that investigation,—having no other foundation. You will see all this from the preliminary pages of the British Report itself. It begins by instructions to the British Commissioners, from the Marquis of Salisbury, and they are dated at the Foreign Office, June 24th, 1891, and on the sixth of these preliminary pages is the actual Commission issued to them as Commissioners; and that is dated the 22d June, 1891, nearly a year before the ratification of the Treaty.

Why was all this? It was for the purpose of enabling those Commissioners to make their investigation and make their joint reports, and give the two Governments an opportunity of coming to an agreement by convention before it would be necessary to take any steps to call Arbitrators together. If, when that Report was made, the two Governments found themselves able to come to an agreement respecting the measures necessary for the preservation of fur seals, no Arbitration would be needed, and none would be called. It was only in the event that they should be unable to agree that there would be any occasion for an Arbitration at all, and that is the contingency, and that alone is the contingency, specified in the ninth Article of this Treaty.

The PRESIDENT.—Do you mean that this is the same contingency which is specified in Article VII,—that both contingencies are the same contingency?

Mr. CARTER.—The word "contingency" does not occur, may it please the learned Arbitrator, in Article VII of the Treaty.

The PRESIDENT.—The word does not occur, but the meaning does.

Mr. CARTER.—No. But I have dealt with the meaning there. I am now dealing with the argument of my learned friends upon the other side based upon this word "contingency", and what that means, and I think I have now succeeded in showing, at all events to my own satisfaction, and as far as I can, to the satisfaction of the learned Arbitrators, that the "contingency" mentioned in Article IX of the Treaty is the contingency that there should be any Arbitration at all.

I must make one modification of that:—"the contingency that there should be any Arbitration at all" upon the subject of Rights or Regulations. In the course of the negotiation, Great Britain had made claims for damages, and provisions were inserted in the Treaty on that score, and it might still be necessary, as those were in reference to past occurrences, and would not be settled by the establishment of Regulations for the future—it might still be necessary for the Arbitration to discharge its functions and to be called together upon the question of damages, but upon that question alone.

Now then, to sum up a little the substance of this debate—what has been the contention of Great Britain on this subject? At the start, they began with the interpretation that all evidence in respect of Regulations, at least, and, as they say, all evidence in relation to seal life, was not admissible until after a decision by the Arbitrators adverse to the claims of the United States in respect to the questions of exclusive jurisdiction, and that it was not until that decision was made that any evidence would be competent or admissible in relation to seal life, and that, therefore, any submission of evidence in relation to seal life in the Case by either party was irregular, not allowed by the Treaty—a thing which they protested against, and reserved their right to move the Tribunal to strike out.

That was their attitude, and the explanatory note of Lord Rosebery in reference to that was in answer to the suggestions from the Government of the United States that this provided no method by which either party could answer the allegations of the other in respect to the most important part of the controversy. His answer to that was: "That is a method of procedure"; and the intimation was that it was for the Tribunal itself to regulate it; so that after it had come to its decision upon these questions of exclusive jurisdiction and found it necessary to enquire into the question of concurrent regulations, it would then establish some system of procedure by which the parties would be apprised of the evidence relied upon by each other, and be able to meet it, making necessary a new hearing and a new decision. That was their first position. The main features of it are still asserted by Counsel on the other side; but the absurdity of supposing that there are to be two hearings, two submissions of evidence, two decisions, and two awards, has struck my learned friend, Sir Charles Russell so forcibly that he has been obliged to retire from that, and he says, if I correctly understood him in the course of his argument, that there is to be no such thing—there is not to be a *decision*, but he insists that the evidence still is not admissible, until the Tribunal has determined that it must enter upon the question of regulations, but that determination it is not necessary to evidence by a judgment, or by a decision, but by an *intimation*—that was the word, I think,—by an "intimation".

Sir CHARLES RUSSELL.—An intimation of a determination.

Mr. CARTER.—Yes, by "an intimation of a determination" an intimation that it had reached such and such a determination.

Now you will have observed all through this debate on the part of the Counsel for Great Britain that there is an assumption that this

evidence in relation to seal life—this vitally important part of the evidence, and only disputable part—has a bearing only upon the question of regulations, or mainly that, thus defending the course pursued by Her Majesty's Government in not incorporating any part of that evidence into the original Case.

For you will perceive, that if evidence bearing upon the subject of seal life is competent and relevant upon the question of property, why, then, consistently with their own interpretation of the Treaty, they were bound to incorporate it into their original Case. For the question of property is one of the five questions which it is made necessary by the provisions of the Treaty that a categorical response should be given by the Arbitrators. The question of property is among them.

The question of Regulations is put by itself; but the question of property is among the first five, and if this evidence in relation to seal life is competent and relevant upon the question of property, why they should have put it into the original Case and not have reserved it, as they did reserve it, until their Counter Case. Is evidence as to the nature and habits of the fur seals not competent upon the question of property? How can that idea be entertained for a moment? How can the question of property be otherwise determined? Suppose both parties had acted upon the view suggested by Sir Charles Russell and maintained constantly by the Government of Great Britain—I will not say maintained constantly, for they, with great respect, are inconsistent upon that point, as I shall presently show—but urgently insisted upon at times, namely, that the testimony in relation to seal life is not competent upon the question of property. Suppose both sides had proceeded upon that view, and scrupulously omitted from their several Cases any matter or evidence relating to seal life, and the Arbitration had gone on with the Cases prepared in that manner, this Tribunal would then be called upon to determine the question of property without any evidence before it except the fact that seals were seals—that is where we would have been. Now I respectfully submit to the Tribunal that that notion that evidence in relation to seal life is not competent upon the question of property is—I do not wish to use the word in any disrespectful sense—but it is preposterous. Such evidence is directly relevant to the question of property—principally relevant to the question of property, and it is the only evidence upon which the question of property can be properly decided.

Let me say in the next place, that this notion that they have brought forward for the purpose of defending their conduct in the preparation of their Case and Counter Case derives no countenance from the diplomatic communications between the parties, or from the provisions of the Treaty itself and those other instruments which are collateral to the Treaty. Let me call your Honors' attention to the *Modus vivendi* of 1891. It is contained in Volume I of the Appendix to the United States Case, page 317; that part of it to which I invoke especial attention is the fourth Article.

The PRESIDENT.—May I ask what is the date of that *Modus vivendi*?

Mr. CARTER.—It is June the 15th, 1891.

The PRESIDENT.—Quite concurrently with the nomination of the Joint Commission,—quite at the same time?

Mr. CARTER.—Yes, Sir.

The PRESIDENT.—They concurred together?

Mr. CARTER.—Certainly, Sir.

The PRESIDENT.—They concurred in time with the nomination of the Joint Commission.

Mr. CARTER.—This Article IV, which I am going to read to you, provides for the investigation which those Commissioners made.—"(4) In order to facilitate such proper inquiries as Her Majesty's Government may desire to make, with a view to the presentation of the case of that Government before Arbitrators, and in expectation that an agreement for arbitration may be arrived at, it is agreed that suitable persons designated by Great Britain will be permitted at any time, upon application, to visit or to remain upon the seal islands during the present sealing season for that purpose." Under the provisions of that Article Her Majesty's Government appointed these two very Commissioners to make those investigations, and appointed no other people; and it was for the purpose of enabling them to present their Case properly that this provision was to be inserted; so that the notion that knowledge in respect to the nature and habits of seals and of seal life had no place in the presentation of the Case is a totally erroneous one, contradicted by both parties by the Agreement into which they entered.

And Sir Julian Pauncefote writes to Mr. Wharton on the 21st of June:

Sir: I have the honor to inform you that I have received a communication from Her Majesty's Principal Secretary of State for Foreign Affairs to the effect that the Queen has been graciously pleased to appoint Sir George Baden-Powell, M. P., and Prof. Dawson Commissioners to proceed to the Pribilof Islands for the purpose of examining into the fur-seal fishery in Behring sea. In accordance with the instructions of the Marquis of Salisbury, I have the honor to request that permission may be granted to these gentlemen to visit and remain on those islands during the current fishery season.

And in this communication of Mr. Wharton, then in charge of the Department of State of the United States, to Sir Julian Pauncefote he said—this is dated June 6, 1891:

But in view of the fact that the evidence which the respective Governments will present to the Arbitrators (if that happy solution of the pending difficulties shall be attained,) must be collected during the present season, and as the definite agreement for arbitration cannot be concluded contemporaneously with this agreement, the President directs me to say that he is quite willing to agree that Her Majesty's Government may send to the Seal Islands, with a view of collecting the facts that may be involved in an arbitration, and especially facts relating to seal life and the results of the methods which have been pursued in the killing of seals, a suitable person or persons to make the necessary observations. The present and the comparative conditions of the rookeries may become an important consideration before Arbitrators in a certain event, and the President would not ask that the evidence upon this subject should be wholly from one side.

I am upon the point which our friends on the other side have insisted upon before your Honors, that this evidence in relation to the nature and habits of the seals is pertinent only to the question of regulations. I have to say that that is inconsistent with their own views expressed elsewhere; and not only expressed but acted upon.

I now call the attention of the learned Arbitrators to Chap. 7 of the British Counter Case, which is to be found upon page 100. They are there dealing with the question of property, and that dealing with the question of property is extended from Chap. 7, p. 100, to Chap. 8, p. 154. There are fifty-four pages devoted to the question of property in fur-seals and to the position taken by the United States in that behalf, and the position taken by Great Britain in that behalf.

Sir CHARLES RUSSELL.—Will you kindly read the heading of the chapter?

Mr. CARTER.—Yes:

Consideration of allegations of fact put forward by the United States in connection with point 5 of Article 6.

And point Five of article 6 I will now read:

Has the United States any right, and if so what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit?

That is the Article which presents the question of property, and the title to this chapter which my learned friend desires me to read is, "Consideration of allegations of fact put forward by the United States in connection with point 5 of article 6." There is a devotion of 100 pages to the consideration of testimony in relation to the nature and habits of seals and the characteristics of seal life as bearing upon the question of property—all connected together in an argumentative chain of reasoning, designed to show that upon those facts the United States has no property in them. I mean to submit upon this, may it please the learned Arbitrators, that the assertion of the learned counsel upon the other side that the questions relating to seal life are not applicable to any of the first five questions stated, and therefore should not go into the Case, are contradicted by their own action.

Mr. Justice HARLAN.—Mr. Carter, I find on looking at the proof of the debate when Sir Charles Russell was upon his feet, assuming this to be correct, I put to him the question—he was discussing the origin or basis of the right of property:

Whether it depends on municipal or international law, how far does the question of the right of property depend upon the facts of seal life?

The answer was:

I have said that in my judgment, so far as the facts of seal life are material for the question of law as to property in seals, they are not in dispute.

Then I put the questions in a different form:

When we come to determine the question if the United States has any right or property in these seals or in the herd, do we consider, and ought we to take into consideration, the facts in seal life?

The answer reported is:

Certainly. So far as they are material, certainly.

Sir CHARLES RUSSELL.—So far as they are material, certainly.

Mr. CARTER.—Yes, Sir; and yet the contention on the part of the learned counsel has been, and the contention throughout this diplomatic correspondence has been—and it is upon that contention that they defend their withholding of evidence in relation to seal life—that it does not bear upon the question of property and does bear upon the question of regulations.

The PRESIDENT.—Is there no evidence adduced by Great Britain in support of these 100 pages of the Counter Case which you have just alluded to.

Mr. CARTER.—None in their case.

The PRESIDENT.—But in the Counter Case.

Mr. CARTER.—Oh, volumes of it, and for the first time; and that is what we complain of. If evidence upon the question of seal life bore upon the question of property, that was one of the five questions upon which the arbitrators were called upon to make explicit answers; and everything bearing upon those questions is by the concession of all parties to be incorporated into the original Case, and yet not one word in respect to seal life was put by them in their original Case.

That, the learned President will remember, was the subject of our complaint; and the answer to our complaint was, "That evidence is not relevant here; it bears only upon the question of regulations, and the

time for its submission does not arise until the Arbitrators have made their decision upon the first five questions;" and therefore the Arbitrators must make their decision without the benefit of such evidence. They protested that it ought not to be put into the original Case; that the action of the United States Government in incorporating such evidence in their original Case was irregular, improper, and not allowed by the Treaty. They reserve the right to move this Tribunal to strike it out. They have committed themselves squarely to it; and yet what I have the honor now to say is, that by their *conduct* they have refuted their own interpretation, and in addition to that, bearing in mind what was communicated to me by Mr. Arbitrator Harlan, it is expressly said by them that the facts of seal life are relevant to the question.

I may also say that in their Counter Case, dealing with the facts of seal life, and arguing the question of property, they use over and over again the report of their Commissioners, which they refused at first to incorporate into their original Case, but which they afterwards, as the Arbitrators will remember, furnished to us at our request upon the understanding that it should be treated as a part of it.

The PRESIDENT.—Had not the British Government agreed to incorporate at your demand the report of their Commissioners into the original Case before the Counter Case was delivered?

Mr. CARTER.—They had. They delivered their original Commissioners' report, and agreed that it should be treated as a part of their original Case. We accepted it on that understanding, but with the understanding also that it should be *all* the evidence upon which they would rely as to the questions respecting the nature and habits of seals, the question of property and the question of Regulations.

Sir CHARLES RUSSELL.—Oh no!

The PRESIDENT.—Do you not think it was legal for them to use the evidence of the report in the Counter Case, since the Counter Case came after that admission of the report?

Mr. CARTER.—Perfectly so.

The PRESIDENT.—I mean do you object to that? That is what I enquire about.

Mr. CARTER.—Not at all. I am not disputing the propriety of that. It was entirely proper. I only meant to say that their use of the original report in their Counter Case while arguing the question of property shows that that original report is *relevant* to the question of property. If relevant to the question of property, it ought to have been put into their original Case.

In their argument they follow the same method. On page 27 they have a part two, and that is entitled "Argument addressed to the fifth question for decision under article six of the Treaty of Arbitration, namely: "Has the United States any right of protection or property in the fur-seals". And they go on in that argument, and make the basis of it, their understanding of the nature of the habits of the seal. That argument goes through many pages.

This is all I have to say, and certainly it is not necessary that I should say anything further, in order to show that the contention made in argument, made in diplomatic correspondence on the part of the British Government, that evidence touching the nature and habits of fur-seals is not relevant upon the question of property is not only—begging the pardon of my learned friends—preposterous upon its face, but has been refuted by their own action in a great variety of forms.

Now, why did they put evidence in relation to the nature and habits of seals into their Counter Case? Why did they put it there? They

profess to say that it does not apply to the five questions stated, that it is relevant only to the question of regulations; that the consideration of the question of regulations is not yet in order, that it will not be in order until the arbitrators have made a decision adverse to the United States—that then, and then for the first time, will it be relevant; and yet, notwithstanding that view, they have crammed their Counter Case with it to repletion. Why did they do that? What is their own excuse for that course so inconsistent with their own view? They said they did it out of deference to the views of the United States. Out of deference to the United States! That is to say—for such is the distinct implication—the United States desired it. That is the implication; that is the *inference*—that the United States Government desired it.

What? The United States Government *desire* that the British Counsel should put into their Counter Case what they had left out of their original Case, and what ought to have been put there? Why, no. The position of the United States was that anything in reference to the nature and habits of seals which you have to submit is to be put into the original Case. If you do not put it into the Case and at the time when that is submitted, you must never put it in. That is the position of the United States, was at the first, has always been, and is now; and yet they say that out of deference to the views of the United States they contradicted their own theory and inserted it in the Counter Case!

The insertion of that matter in the Counter Case is the great thing to which we have objected. We object to that, and have objected all along, on the same grounds upon which we object to the reception of the present supplementary report of the British Commissioners.

Now then, let me approach the point now before this Tribunal. What is it? It is whether a certain document that has been placed before the Tribunal of Arbitration should be retained or should be returned to those who sent it. That is the question before you. Is the submission of that paper defensible upon any possible view? On the view entertained by the United States concerning the interpretation of the Treaty, of course it is not; and I am not going to repeat my argument upon that point, but to assume that I have sufficiently established it. On our interpretation it is a wholly inadmissible proceeding to submit such a paper as that in the manner in which it was submitted. What is the character of the paper? I don't know. I have never seen it, and I have no information about it; but I suppose I may say that it is to be presumed to have a bearing upon the merits of this controversy. If it has not any bearing upon the merits of this controversy, why of course it should not be received. It must be presumed to have a bearing upon the merits of this controversy. The very fact that it is submitted shows that.

What bearing may it have? It may contain either arguments or evidence, or, as they euphemistically style it, "trustworthy information". If it contains arguments alone, it is improperly submitted. Learned counsel are to argue the case of the British Government, not these Commissioners. If it contains evidence bearing upon this controversy, then as I think I have succeeded in showing, it is wholly inadmissible. I have now to submit to the learned Arbitrators that it is inadmissible upon their view of the Treaty—the view of the counsel of Great Britain.

What is their view of the Treaty as to the time when they are permitted to submit evidence, even supposing that it bears upon the question of regulations only? If it bears upon the question of property, they must admit that it is admissible and only admissible as a part of

the original Case; but assuming for the purpose of argument, that it bears upon the question of regulations only, when, according to their theory, is it admissible? It is admissible, according to their theory, in a certain contingency, and in a certain contingency only; and what is that? The decision by the board of Arbitrators adverse to the United States upon the question of exclusive jurisdiction. Has that decision been made? Certainly not. Therefore, upon their theory it is not competent or admissible here. Let me ask whether it is admissible on the original theory of the British Government as modified by the learned Counsel, who has so ably argued this question on their behalf. How has he modified it? Why, he has said: "Any decision; I don't mean a formal decision, I mean an intimation." Has that intimation been given? No more than the decision.

There is another aspect in which evidence might possibly be admissible, and that is, if the Arbitrators themselves after they come to the question of regulations, or when they are considering the questions of regulations suggest that further inquiries or further evidence is admissible, then it might come. Have they made any such suggestion?

Mr. FOSTER.—The provision is: "They may require a written or a printed statement, or argument, or oral argument by Counsel."

Mr. CARTER.—I will read it:

"And the Arbitrators may, if they desire further elucidation with regard to any point, require a written or printed statement or argument by Counsel upon it." I stand corrected.

Mr. PHELPS.—That is restricted to Counsel.

Mr. CARTER.—That is restricted to argument, and does not deal with evidence. Therefore upon no possible interpretation, not even their own, is this supplementary Report admissible, and I submit very respectfully to the learned Arbitrators that it should be promptly rejected and returned. That is the only just disposition which can be made of that paper.

I have concluded my argument in respect to that. I desire to make one or two observations, not by way of argument upon this point, because I have concluded that, and I am not going to attempt to take it up again. My learned friend, Sir Charles Russell, stated with some emphasis that while the United States contended that evidence in relation to the nature and habits of the seals relevant to the question of property and also relevant to the question of regulations, should be presented in the original Cases and presented only there, that we had ourselves acted in contradiction to that view and had incorporated evidence of that character into our Counter Case contrary to our own views. He referred in that connection, I believe, to the three reports of Capt. Hooper and Capt. Coulson which deal with the condition of seal life in 1892; and to the reports of certain Treasury officers, two or three of them, also having relation to matters in 1892, I believe. I do not know that he referred to anything else. That is all I remember.

Let me say in reference to the pieces of evidence thus referred to that they may in part be subject to the criticism which my learned friend puts upon them. That is, that they so far relate to seal life as to be germane to the main questions, and therefore properly the subjects of insertion in the original Case.

Sir CHARLES RUSSELL.—I would like to interpose here, Sir, in order to avoid, so far as may be possible, matters that are really not in controversy. I was making no complaint of the insertion of that evidence. I was pointing to the fact that it was evidence which from the nature of the case we had no opportunity of in any way meeting or replying to.

I was pointing out that that was a necessary incident, almost indeed a necessary incident, to the proceedings of a Tribunal constituted as this is; but I was making no complaint of its appearing there, in any sense.

The PRESIDENT.—We perfectly understood you.

Mr. CARTER.—No complaint; but still my learned friend insisted with great emphasis that the course thus pursued by the United States was not justified by their interpretation of the Treaty.

Sir CHARLES RUSSELL.—Oh! no.

Mr. CARTER.—I understood him to say that. If I am mistaken about that, then I will pass by the observation.

Sir CHARLES RUSSELL.—It was addressed solely to the argument of my learned friend, Mr. Phelps, who was complaining of the injustice of certain evidence being put forward which the other side had not had an opportunity of answering. My reply was that that was a necessary incident of this case, that they had included in their Counter Case (and I was not complaining of it or making objection to it,) matter which we had no opportunity to answer.

Mr. CARTER.—Well, I must have a word to say in regard to the observation just made, that the presentation of evidence without giving the other party an opportunity to reply to it is a necessary incident of this controversy. I have a word to say upon that point, if any argument is made upon that. To a certain extent, and to a very small and insignificant extent, it is a necessary incident of this controversy; but in regard to the main and principal features of this controversy, it is not, I may be permitted to say.

In reference to all the main questions in dispute here, if the parties had fully, fairly, faithfully presented the allegations upon which they relied, as the Treaty designed that they should, in their original Cases, there would have been full complete and substantial opportunity by each party to reply. Of course, there is no opportunity here to reply to replying evidence. The course of pleading must stop somewhere, and according to the provisions of this Treaty it stops with the Counter Case. There is no opportunity to reply to that, but the provision of the Treaty supposed that there would be no new matter inserted in the Counter Cases; if the provisions of the Treaty were faithfully followed, there would be no new matter inserted in the Counter Cases, and no occasion, therefore, to reply.

I do not mean that it is not a necessary incident of that course of procedure that there might be put into the Counter Case, of one of the parties or of the other, some matter as to which the other side might very properly desire to add further explanation. That is indeed a necessary incident, but it is too small and too insignificant for notice or attention, in view of the fact that the great purpose of reply, the great purpose of giving each of the parties an opportunity to answer the proofs and allegations of the other, is provided for by the Treaty, and that the want of an opportunity to further reply is not in any material or substantial sense a necessary incident of the manner in which the controversy is provided to be conducted by the terms of the Treaty itself.

I wish to say in reference to these further reports of ours, which are not complained of: we inserted them in the Counter Case? Why? We could not have inserted them in the original Case. They were investigations in respect to matters which arose after the original Case was prepared, or while it was being prepared, and therefore could not be inserted in it. We therefore did not withhold anything. The matter did not exist until after the preparation of the original Case, and there-

fore could not have been introduced into it. Next, we suppose that much of the matter contained is germane and proper to be inserted in the Counter Case by way of reply to what was contained in the Report of the Commissioners of Great Britain, which was, by agreement, made part of the original Case of Great Britain, and therefore perfectly regular in that point of view. So far as there may be anything beyond that, if there is any objection to it, if it is supposed by the other side that this is matter which ought to have been inserted in the original Case, and which, had it been inserted in the original Case they should have had an opportunity to reply to—we do not ask to have it retained; and upon their objection, if they can point to any matter distinctly of that description we are willing to have it stricken out, provided, of course, the same rule is applied to them in respect to any new matter submitted by them in their Counter Case.

Mr. FOSTER.—The matters relate to the conditions of seal life in 1892.

Mr. CARTER.—Of course, that is what I have said, that it had reference to facts occurring while the Case was under preparation, that is seal life in 1892.

The PRESIDENT.—You practically make no motion for retiring part of the evidence brought forward in the British Counter Case.

Mr. CARTER.—We do not make any such motion. Yesterday I endeavored to explain to the learned arbitrators the grounds upon which we thought it inexpedient to do so. We could make that motion, and as we conceive, it should be granted and would be granted. But where should we be left? Why, the practical failure of the arbitration almost might be involved, or we be called upon to go into a contest here with our adversaries crippled. That is not the kind of controversy in which lawyers like to engage, even where the crippling comes in consequence of their own fault and not in consequence of any fault of ours. It is not a victory won over an adversary who is in that condition that we desire. It is a settlement of this controversy upon just grounds. It is a settlement of the controversy when the Tribunal has before it all the facts proper to be looked into for the purposes of a settlement. That is what we desire; what we regret is, that those facts were not placed before the Tribunal at the time and in the manner in which it was contemplated by the provisions of the Treaty they should have been placed. That is our grievance—as my learned friend has observed that we seem to be in search of a grievance. I confess it is a grievance. Must a party when he it stricken with a pretty severe blow rest quiet under it and say nothing about it, or else be stigmatized as searching for a grievance? We may be subject to that observation, that criticism; but it is in our judgment a circumstance far too important to be omitted from deliberate consideration in the course of the discussions in this case.

There is one other matter which has been referred to and assumptions made in reference to it several times during the course of the argument, and which, although it is not in any sense material to the present discussion, I ought perhaps to say a single word in regard to.

Calling the attention of the arbitrators again to the provisions of article 6, it appears that there are four questions which purport upon their face to relate in some manner to an asserted power or jurisdiction of the United States in Behring Sea. There are four of them of that character. The fifth is:

> Has the United States any right, and if so what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring sea when such seals are found outside the ordinary three mile limit.

That fifth question does not purport on its face to relate to or involve any matter of exclusive jurisdiction. It differs from the other question in that regard. It embraces certainly the property question. Whether it embraces anything else, or not, is perhaps not entirely clear.

Now let me call your attention to Article VII:

> If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary.

"The foregoing questions as to the exclusive jurisdiction."

Now, how is that to be interpreted? Is it confined to those four first questions which purport on their face to relate to exclusive jurisdiction, or does it include the whole? That is the question, does it include the whole?

A plausible argument could be made in support of either of those positions. It might be said that the foregoing questions as to the exclusive jurisdiction of the United States relate to the first four and do not include the fifth question, that not being a question relating to the exclusive jurisdiction of the United States; and I think upon the other hand it may be claimed with equal, perhaps greater plausibility, that Article VII contemplates all five of those questions as relating, in a greater or less degree, to the exclusive jurisdiction of the United States.

You will observe that it says: "If the determination of the foregoing questions as to the exclusive jurisdiction of the United States." That implies, at least, that they all relate to the exclusive jurisdiction of the United States.

The PRESIDENT.—You do not mean to say "jurisdiction" is the same as "rights of sovereignty"?

Mr. CARTER.—Well, now, what "jurisdiction" means, who knows? We shall have something to say about that by and by. That is a word of very ambiguous import; I shall talk more about this question when we get to the merits of the case. I do not wish to anticipate the discussion at all here, but only to throw out a suggestion that either of those two views may be taken; and what favors the second view, in my judgment, is this consideration: If it were held that the United States had a perfect property in the fur-seal, even while it was at sea, the question may be made, indeed it has been made by Great Britain, whether the United States has the right to enforce the protection of that property on the high seas by the assertion of acts of power; in other words, whether it has the right to seize and carry in for condemnation a vessel that is engaged in an invasion of that right? The position is taken by Great Britain in this controversy that, even if the right of property were fully established, the power thus to act in the way of seizing a vessel does not exist; that is to say, that even if the right of property exists you have no jurisdiction to do that particular thing, the seizure of a vessel on the high seas by way of protecting that property.

Therefore this question: "Has the United States any right, and if so what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring sea when such seals are found outside the ordinary three-mile limit," may properly be regarded as a question of jurisdiction, in the vague sense in which "jurisdiction" is used throughout this Treaty.

Both those interpretations may be, with a good deal of reason, entertained. I have now to suggest, however, that it makes not the slightest difference which view is taken upon that point, for the same result will be arrived at in either case. Suppose we take the first view, that it is

confined to the four first questions and does not include the question of property.

"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective governments are necessary", etc. If we limit that to the four first questions what would be the grounds of proceeding?

The PRESIDENT.—Do you not think that we might reserve these very interesting observations for our next sitting?

Mr. CARTER.—After the recess?

The PRESIDENT.—Yes, after the recess. It would afford you occasion for a rest, and I dare say you require a little rest yourself.

(The Tribunal thereupon took a recess for a short time.)

Mr. CARTER.—I was speaking, when the Tribunal took its recess, upon a matter about which there has been some debate, but which is not vital to the present motion at all, respecting the interpretation which is to be placed upon the words in the seventh Article of the Treaty, namely: "The foregoing questions as to the exclusive jurisdiction of the United States." I had said that that was susceptible of two interpretations, one of which would limit these foregoing questions to the first four stated in Article VI and did not include the property question, and the other interpretation would include all of them, the property question as well. I also observed that it did not seem to me that anything of practical importance depended upon which of those views should be taken to be the true one, for the result as it seemed to me, would in either case be the same. It is that which I wish very briefly to show to the Tribunal—that the result would be the same in either case. After the arguments have been finally concluded, it will be the duty of the Arbitrators to proceed according to the first provision of Article VI: "In deciding the matters submitted to the Arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points." Therefore, their first task will be to make their decision on those five points. Let us assume it to have been made, and that the decision in respect to the 5th point is that the United States has the full property interest in the fur seals which it asserts. Let me suppose, for the purpose of argument, that that state of things is found to exist when the Arbitrators have complied with their duty, and decided the first five questions. It will then become necessary for them to consider whether the subject is left "in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to the Behring Sea." Suppose they put upon that clause the narrower interpretation, namely that it includes only the first four questions, and ask whether the subject is then left "in such position that the concurrence of Great Britain is necessary". Let me assume that the decision is adverse to the United States on the four points, and on the fifth point is fully and completely in favor of the United States. Then the question with the Arbitrators is: Does the decision of the Tribunal on the first four questions leave the subject "in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the preservation of the fur-seal". Well, of course, the first four questions having been decided adversely to the United States, so far,

at least, the subject is left in a position which requires the concurrence of Great Britain; but the decision of the Tribunal in reference to the 5th question is in favor of the United States, awarding to it a full property interest. Does that alter the case? What is the effect of that decision upon the subject? Is the subject then left in such a position that the concurrence of Great Britain is necessary? That will depend on the opinion of the Arbitrators as to the right which the United States has to protect an admitted property interest outside of the three-mile limit. If they should be of the opinion that it follows from the determination of the property interest in the United States, such as it claims, that it does have the full right of protection, it may then think that no assistance is necessary for the preservation of fur-seals, by regulations, and that the concurrence of Great Britain is not necessary, but that the United States, having the power to prevent pelagic sealing, is fully armed with the right to take whatever measures are necessary for the protection of fur-seals.

Suppose, however, they happen to be of the view, which has been taken by Great Britain in the course of this controversy at some times—whether it will be still persisted in argument, I cannot say—namely, though the United States may have a property interest in the fur-seals, it cannot seize a vessel outside the ordinary three-mile limit that is engaged in pelagic sealing then it would be necessary to have the concurrence of Great Britain to make effectual regulations for the preservation of the fur-seal.

Let me suppose the contrary view, and that the foregoing question relating to the exclusive jurisdiction of the United States included all these five questions, the property question, as well, what will be the course of procedure then? The Arbitrators will make a decision on all these five questions. Then the question which they will have to consider will be, does the decision which we have made on these five questions leave the subject in "such position that the concurrence of Great Britain is necessary for the establishment of regulations to preserve the fur seals?" And let it be supposed, again, that the decision is adverse to the United States on the first four questions and in favour of the United States on the fifth. Well, they would go through with precisely the same considerations which I described them as being obliged to go through with on the supposition that these foregoing questions, as to jurisdiction, relate only to the first four questions and do not include the property question. It would be the same thing in any event, and if we suppose that the decision of the Arbitrators should be against the United States on the question of jurisdiction, then of course it would be their view that the concurrence of Great Britain would be necessary as to regulations to preserve the fur-seal. It, therefore, seems to me, so far as I can perceive, that no practical importance of any considerable moment rests upon the question, whether we regard the term "the foregoing questions as to the exclusive jurisdiction of the United States" as embracing the first four questions mentioned in Article I or embracing the entire five.

That is the explanation I desire to make.—With this I should stop, and I had said to the Tribunal that I should not again touch the question relative to the introduction of the paper which was the subject of our motion, but I reckoned a little without my host. There is a single position taken by my learned friend, Sir Charles Russell, to which I have not replied, and to which if I should fail to reply it would be perhaps taken as a concession, and I do not desire that I should be considered as making any concession on that point. I shall say but a word

about it. That position is, that the submission of the evidence to the Arbitrators on the question of regulations at least is admissible at any time down to the final decision. It is indeed necessary for him to take that position. For as I have already shown, there is no other ground upon which this paper is admissible, and it being necessary for him to take that position he finally does take it, and says he does not withdraw. I must say one word therefore in reference to it. If that is true, the paper was admissible on the day when it was delivered. It has been admissible every day since then, and will be admissible down to the last day on which we shall be engaged on the argument of this question. If it was admissible the day before it was actually delivered, it was admissible every day before that up to the time when the Counter Case was delivered and might have been incorporated into the Counter Case as an appropriate part of that document. In other words, the position of the learned Counsel is, that this Supplementary Report of the British Commissioners, and any evidence like it directed to the same point, is admissible at all times at the pleasure of Her Majesty's Government with this single exception, that it is not admissible as part of the original Case and could not have been put in there. That ground they still assert. In other words, his position is, that the British Government is able to lay before the Arbitrators on the question of regulations such evidence as they please at any time and in any manner, provided that they do not offer it at a time and in a manner when the United States can reply to it. That is all the observation that I have to make to this position.

With these observations, and greatly regretting the inordinate length, for which I may be perhaps in some way responsible, to which this argument has been protracted, and with many thanks to the Arbitrators for the consideration they have extended to me, I take my leave of this motion.

Sir CHARLES RUSSELL.—With your permission, Sir, I would claim leave from the Tribunal, not to go over any point in my original argument or anything that has been advanced in reply to it, but to refer to certain matters that have been introduced by my learned friend, Mr. Carter, and not previously advanced in argument, which I have not had the opportunity of dealing with. I mean the matter relating to the diplomatic correspondence which took place in 1890 and the argument sought to be based on that correspondence. I claim respectfully the concession from the Tribunal, the opportunity in a very few words of showing that my learned friend has entirely misconceived the purport of that correspondence.

Mr. CARTER.—I must object to this.

Sir CHARLES RUSSELL.—Well, Sir, perhaps I ought to have said this in addition, that if the Tribunal decide that that diplomatic correspondence is relevant to the construction of the Treaty which is the question before the Court, then I claim the right to answer that branch of the discussion or argument; but, of course, if, as I shall contend, it is not relevant, and if the Tribunal should have that view, I do not seek the opportunity of replying. Should it, however, enter into the minds of any of the Tribunal that it is relevant to the construction of the Treaty, then I claim to point out the fallacy and the mistake under which my learned friend labours.

The PRESIDENT.—The diplomatic correspondence has been communicated to us as part of the information that it is necessary for us to take into consideration, and, consequently, we cannot help considering it as relevant, in a certain measure, to the Treaty under which our powers are defined.

Mr. Justice HARLAN.—That may or may not turn out to be the case. We may look into it, and may come to the conclusion that it does or does not interpret the Treaty. Whether that is our conclusion, we cannot know until we confer among ourselves.

Sir CHARLES RUSSELL.—Then, if that be so, I should claim to make an observation limited to that part of the discussion.

The PRESIDENT.—I think the observation of my learned colleague goes to giving you leave to reply on the special points you hinted at; but we must preserve also the right of the opposite party to reply to your observations within the same limits, of course,—I mean, within the same limits of time and of substance.

Sir CHARLES RUSSELL.—I will confine myself to five minutes, if my learned friend, Mr. Phelps, will come under the same obligation.

The PRESIDENT.—I do not imagine for a moment that you intend arguing the case over again; in fact, you specially said that you did not want to do so and that your observations will be necessarily limited in their nature and, consequently, necessarily limited in their time which you will require to explain them. And, therefore, I would ask the adverse party to keep within the same limits,—within analogous limits of substance and analogous limits of time if possible.

Mr. PHELPS.—I was about to observe, Mr. President, unless the point is decided, that the whole matter of the diplomatic correspondence of 1890 as affecting this Treaty, was gone into in the opening. The report of the opening argument which lies before you shows that it was fully gone into. The correspondence was not perhaps read so fully as it might have been, and I apologise for not having read it; but I stated the substance of it, and the point was made very fully, whether, clearly or not, that the meaning of the word "contingency" as it occurs in this Treaty was to be found by referring to the previous negotiations.

Sir CHARLES RUSSELL.—With great deference, this is argument.

Mr. PHELPS.—No, I only want to state this, that the point was gone into fully in the opening, and Mr. Carter, of course, went over the same ground in reply to the views of the other side. I suppose we are entitled to the opening and the close; I do not wish to be captious certainly, but I was about to submit that the argument ought to be regarded as completed. If the Tribunal thinks otherwise, then I shall claim the right to reply to Sir Charles.

The PRESIDENT.—Yes. I do not think that we can preclude the English Counsel from making fresh observations, if they think fit, on what they consider is a new matter. Sir Charles, I think that was the purport of your demand?

Sir CHARLES RUSSELL.—Entirely, Sir. I do not propose to refer to anything except what is strictly and properly to be described as new matter. I will observe the limits of time, and will undertake to conclude in five minutes, if not less.

The PRESIDENT.—We have never found, as yet, that you speak too long; and I hope you will not have any impression of that sort.

Senator MORGAN.—Is it understood that Mr. Phelps is to be limited to five minutes?

Lord HANNEN.—No; it is only a promise, of course.

The PRESIDENT.—We should be the first victims of anything of that sort; not only from being deprived of the pleasure that we have from hearing Counsel, but also of their efforts which enlighten our minds in this matter.

Sir CHARLES RUSSELL.—My friend shall find no excuse for a protracted reply to me, for I will only make one observation. You are asked to construe the Treaty, under which you sit, of the 29th February, 1892, and you are asked to construe the terms of that Treaty of 1892 by reference to diplomatic correspondence in 1890, and the suggestion based on the diplomatic correspondence of 1890 is that there was then a contemplation of a submission of questions to Commissioners, and a contemplation that if the Report of those Commissioners was made in a certain direction there would be an acceptance of the Report of those Commissioners, and no need for Arbitration at all. My answer to that is two-fold: first, that the negotiations referred to in the communication of Sir Julian Pauncefote had relation solely to the question of Regulations, and had no relation to the question of damage claimed by Great Britain, for the invasion of the rights of its national ships; next, that that attempted Convention was one as to which it was supposed Russia might be induced to become a party, and Russia had no concern with the question in dispute between the United States and Great Britain at all, in relation to questions of right and of damage arising out of the seizure of the British ships; and, lastly and conclusively, at the same time, overlapping the same dates, there is, if you read the correspondence, evidence that the parties were then discussing the question of Arbitration which should deal with the question of right, and, incidental to the question of right, with the claims of the British Government to compensation in damages. Now Sir, I have been only a minute and a half.

Mr. PHELPS.—It does not appear to me, Sir, that my learned friend quite comprehends, with all his acuteness of comprehension, the use that we make of this previous correspondence. It has nothing whatever to do with the question of damages between these Governments. It has nothing whatever to do with the concurrence of Russia. We resort to it only to explain an ambiguity in one of the terms of this Treaty, that is to say, to find out what this word "Contingency" refers to. Does it refer to the contingency that this Tribunal shall decide the first five questions in favor of Great Britain, or does it refer to the Contingency that formerly existed whether the Tribunal would ever sit at all?

Now it is urged in support of the admissibility of this evidence that the Treaty provides that the evidence is only to be submitted in the contingency of your decision in favour of Great Britain upon the other points. We say that when you go back to the former negotiations and correspondence you will see how that term "Contingency" got into this Treaty, and therefore that it has no such meaning—that it was imported into the Treaty from language employed when there was a contingency, as originally contemplated, whether there should be any Arbitration at all. If when the Treaty was first proposed these Commissioners had agreed upon a satisfactory code of Regulations which the Governments could have adopted, then there never would have been any Arbitration but it was contemplated that if they did not agree, or if agreeing the two Governments should not agree to adopt their conclusion, then there should be an Arbitration. There was a then existing Contingency, and that is the Contingency that has found its way into this Treaty, and has caused the word to be used in this connection. One construction, if adopted, would make the Treaty provide for the submission of evidence on all points in the Cases and Counter Cases, so that it could be answered on the other side. The construction for which my learned friend contends, results in the contrary, that is to say that evidence may be admitted that we cannot reply to, and that is the subject of this debate.

The PRESIDENT—Mr. Phelps, is it within your knowledge (as Sir Charles Russell has just alluded to it) that it was in the view of both Governments to have at any rate an Arbitration upon the legal points if not upon the Regulations?

Mr. PHELPS.—I think not.

The PRESIDENT.—That is a matter of fact upon which I ask you for information.

Mr. PHELPS.—I think no Arbitration was originally contemplated on any of these questions of right for this obvious reason. The negotiations in 1887 and 1888 had reference exclusively to the protection of the seal. Only when these failed were the claims of right brought forward. If these had not failed it could have been of no possible importance to the two nations to discuss these claims or to have them decided.

Sir CHARLES RUSSELL.—How is the question of damage to be ascertained?

Mr. PHELPS.—I will allude to that in a moment. An Arbitration is as entirely unimportant unless it became necessary for the protection of the seal. If the two Governments had come together, and had adopted a system of Regulations which both regarded as satisfactory and sufficient, then it would be idle farther to debate whether the United States Government had a right of property in the seals which it would become unnecessary to enforce. And it would be idle to discuss whether they had derived from Russia certain special jurisdiction to these water rights because they did not need them for any other purpose. And as to any question of damages which had then arisen, if the main subject of the controversy, the protection of the seals, had been disposed of, it is not conceivable that the comparatively small amount in dispute would have given the Government any concern. They would have agreed about that in a moment, if they had agreed about the rest. As you will perceive, and as you will perceive still more clearly when we come to argue the merits of the case, this discussion in 1887 began by a proposal on the part of the United States.

Sir CHARLES RUSSELL.—This is rather going beyond the point I think.

Mr. PHELPS.—I am answering only the President's question about a proposal for a convention that would provide for the protection of the Seal; it comprehended nothing else, and, as we shall contend, that was acceded to on the part of Great Britain, and Regulations were prepared and provisionally agreed upon, and then the objection of Canada was interposed and that fell to the ground. In the whole course of that you will see that no question of damages was raised.

Sir CHARLES RUSSELL.—Oh! really, Mr. Phelps; I must distinctly dissent from that.

Mr. PHELPS.—I am speaking of what I personally know.

Sir CHARLES RUSSELL.—Then, Mr. President, I challenge my learned friend, Mr Phelps, to refer to any document in which Great Britain ever receded from the position of claiming compensation for what she alleged to be illegal seizures, or any paper in which the United States said they were, if Regulations were agreed to, ready to pay compensation in respect of those illegal seizures.

The PRESIDENT.—That is not quite the purport of what Mr. Phelps said.

Mr. PHELPS.—No, Sir, it is not. I said that when, under the instructions of my Government, I introduced this subject in 1887, the sole proposition made on the part of the United States was for a Conven-

tion that should save these animals from extermination; and, as we claim to have proved in our Case, that proposition was at once acceded to by Great Britain,—a code or a proposed code from the United States was invited, and it was furnished and was provisionally agreed upon, and only the objections of Canada prevented its being carried into effect. And what I said was, not that Great Britain then receded from any claims for seizure,—hardly any, if any, had then taken place.

Sir CHARLES RUSSELL.—Oh! yes.

Mr. PHELPS.—Well, there may have been, and I will not say there was not.

Sir CHARLES RUSSELL.—8 or 9.

Mr. PHELPS.—What I was saying was not that Great Britain receded from any such claim or that the United States acceded to it; but that nothing was said in regard to it on either side between the Governments in the whole course of this negotiation. When the Arbitration came to be agreed upon, then the question of damages was imported into the Case. All that is foreign to the point now before us, which is what is the meaning of the word "Contingency" as affecting the time when the evidence is to be taken, the time when the question is to be heard, and on what evidence it is to be heard.

The PRESIDENT.—Sir Charles, I think it is not proper to argue just now upon the Regulations themselves, or as to either the origin or the purport of the first draft; but I will merely ask you to be so kind as to state on what authority is founded the assertion that you just made that the Governments had contemplated the institution for an Arbitration on the legal points as separate from the Regulations?

Sir CHARLES RUSSELL.—Certainly, Sir; I will give you the dates. The draft of the proposed Convention is the 29th of April, 1890. I refer you to page 461 of the third volume of the Appendix to the British Case.

The PRESIDENT.—Our documents have not the same paging as yours have.

Sir CHARLES RUSSELL.—I think the first part is exactly the same. This, you see, Sir, is within less than a fortnight of the date.

The PRESIDENT.—Which date?

Sir CHARLES RUSSELL.—The 11th of May, 1890. You will find it is number 334, Sir Julian Pauncefote to the Marquis of Salisbury—"As to compensation for damages referred to in your Lordship's telegram of the 9th instant,"—that brings it still closer to the 30th,—"I have prepared, after discussion with Mr. Tupper, a draft Arbitration Agreement on the basis of your Lordship's instructions?" The last line of that document also I refer to. It is, "Proposal for Arbitrators and Umpire will be agreed to by Mr. Blaine."

The PRESIDENT.—This draft Arbitration Agreement has not been produced?

Sir CHARLES RUSSELL.—No, Sir.

The PRESIDENT.—We have not got it?

Sir CHARLES RUSSELL.—No, Sir; but what I am at present, of course, referring to is to shew that my friend's position, that the proposed Regulations, to which it was hoped Russia would be a party, did not displace the claim for damages and did not displace the claims of right upon which the right to damages depended, and that there was, contemporaneously with the consideration of these Regulations, that claim for damages and a proposal to arbitrate in reference to it. That is shewn by the telegram of the 11th of May, which I have read. If you will then, Sir, go to the document of the 22nd of May, a long

letter on page 462, you will find a long despatch from Lord Salisbury to Sir Julian Pauncefote arguing out the question of right and the illegality of the seizure of the British vessels. That, Sir, is the 22nd of May, 1890. Will you then, Sir, go on to page 481?

The PRESIDENT.—Is there any mention of Arbitration in this despatch.

Sir CHARLES RUSSELL.—In this particular letter—No. It was combating the argument of Mr. Blaine affirming that the United States were justified in doing what they had done. If you will then, Sir, go on to page 481 of the same volume.

The PRESIDENT.—That may be called argument on the legal point.

Sir CHARLES RUSSELL.—Yes, on the legal points strictly, Sir. On page 481, at the top, you will see the document No. 360. Now, Sir, at this time (I have not troubled you with the intermediate correspondence) they were getting closer upon the point of Arbitration agreement as to right, and as to damages, and they were also getting closer to Arbitration agreement upon the point of Regulations; and the question arose what was to be done, as the sealing season was beginning about June—what was to be done to prevent injury to the sealing (so called) "industry" at that time, and in answer to a demand from the United States that something should be done in the interim, Lord Salisbury was requested, having stated that he had no legal authority, and the English Executive no legal authority except under statute law, to prohibit acts by their nationals,—he was requested to give some public notification which might have, although not legally binding, some operation on the action, and control the action, of Canadian sealers. Accordingly he telegraphs to Sir Julian Pauncefote on the 12th of June:—"Referring to my previous telegram of today's date, if we could come to terms on this proposal he would suggest some such kind of proclamation as the following:—Whereas the United States and Her Majesty's Government have agreed to refer to Arbitration the legality of the United States in making certain captures of British vessels in the Behring Sea, and whereas the United States have engaged if the award should be adverse to them to pay compensation not only for that interference, but for any loss arising from abstention from sealing consequent on this Proclamation, captains are hereby requested not to seal in Behring Sea during the present season."

Mr. PHELPS.—Was that the season of 1890 or of 1891?

Sir CHARLES RUSSELL.—1890. On the 3rd of June Sir Julian Pauncefote writes this. It is the next document.

"I have the honor to inform your Lordship that since the receipt of Mr. Blaine's note of the 29th ultimo, informing me of the rejection of the draft Convention by his Government"—that is to say the Convention for Regulations put forward on the 29th April—"I have been in constant communication with him with view of coming to some possible settlement of the Behring Sea question. On the 30th ultimo Mr. Blaine informed me that he was to have an interview with the President, the result of which he promised to communicate to me as soon as possible. I accordingly received a note from him last night, a copy of which is enclosed herewith, in which he states that the President is of opinion that an arbitration could not be concluded in time for this season, but he is anxious to know whether Lord Salisbury, in order to promote a friendly solution of the question, will make for a single season the Regulation which in 1888 he offered to make permanent. Your Lordship will observe that the above proposal is identical with that contained at the conclusion of Mr. Blaine's note of the 29th ultimo. In

view of the receipt of your Lordship's telegram of the 31st ultimo, and in order to save time, I at once wrote a note, a copy of which is also inclosed, to Mr. Blaine in reply, in which I informed him that Her Majesty's Government were not prepared to agree to such a Regulation as was suggested by Mr. Blaine."

Now, Sir, I go on to the 4th June 1890. It is on page 484—that is a long communication from Mr. Blaine arguing on the question of Arbitration or no Arbitration—it begins at page 484 but it ends at page 486—where the question which I am putting forward is referred to, and also urging the need for some present Regulation which should be operative then and there as a temporary expedient, and the communication concludes on page 486: "The President does not conceal his disappointment that, even for the sake of securing an impartial arbitration of the question at issue, Her Majesty's Government is not willing to suspend for a single season the practice which Lord Salisbury described in 1888 as the wanton destruction" and so forth.

From that date there is a complete and absolute disappearance of the question of Regulations pure and simple, or of a Convention with reference to regulations pure and simple; and it becomes, from that point forward, until the 29th of February 1892, a discussion upon the question of the Treaty which should embrace both Regulations, and the decision of questions of right and damage consequent upon questions of right. I can go on with a multitude of documents to make good this position.

Mr. CARTER.—Let me inform the learned Counsel that it will involve a reply by us.

Sir CHARLES RUSSELL.—I beg your pardon. I am simply answering the question of the President.

The PRESIDENT.—Of course, Mr. Carter, your right to reply is reserved.

Sir CHARLES RUSSELL.—I am simply answering the question put to me by the President. I have not interpolated (with one exception for the sake of brevity) any remarks. The 7th June document is at page 511 of the same book.

Mr. PHELPS.—There is no dispute at all that at that stage, the whole subject was discussed.

Sir CHARLES RUSSELL.—Very well.

Mr. PHELPS.—All the correspondence shews that. It is printed in both Cases and on both sides.

Sir CHARLES RUSSELL.—I do not know, Sir, whether you or the other members have gathered my friend's admission which I am grateful for.

Mr. PHELPS.—I do not think you quite understood me, Sir Charles, if you will allow me. I do not wish to interrupt you, but I may perhaps set you right upon this. I do not at all question, what all the correspondence on both sides for a considerable period prior to the execution of this particular Treaty shows,—that after the Governments found that Regulations could not be agreed on, then the questions of right were introduced and began to be discussed, the United States claiming rights which Great Britain denied. And that then Great Britain brought forward likewise the claim for damages the Government thought they were entitled to if these claims of right failed. I do not deny that at all. All that I set out to say was, and all the importance that I attach to it at this stage is, that in the beginning of this controversy, there was nothing at issue excepting the adoption of Regulations that would preserve the seals,—nothing more. There were some seizures in 1886; but the amount each now claimed is so small, that

both parties have expended more already in this Arbitration than it all comes to, and I do not conceive that an Arbitration ever would have been resorted to between the Governments for so small a subject as that. That is all I meant to say. I beg pardon for interrupting you, Sir Charles.

Sir CHARLES RUSSELL.—Not at all. Allow me to point out what the state of things was. Up to 1890 my learned friend seemed to hesitate and to doubt what seizures had been effected; and he treats it as an inconsiderable matter.

Mr. PHELPS.—Comparatively.

Sir CHARLES RUSSELL.—I beg to observe that, in 1886, there had been a seizure of four British vessels, confiscation, imprisonment of their sailors and captains, or some of them; in 1887, there had been seven seizures, making, with the first four, eleven. In 1889 there had been eight seizures, making nineteen. In 1890, there were further seizures; and yet my learned friend suggests two extraordinary propositions; first of all, that the British Government, denying from the beginning to the end the claim of right of the United States, were yet willing, if Regulations were agreed to, to submit to this action, which they claim to have been illegal action and without warrant in law, without justifying the claim of their nationals to compensation in damages.

Mr. PHELPS.—Oh! no.

Sir CHARLES RUSSELL.—And next he commits the United States to this extraordinary position, that they were willing to give up their assertions of right of jurisdiction, stated in the first four questions, and their assertion of property in the seals, or in the individual seals, or in the herd, or in the "industry," provided Regulations could have been conventionally agreed to.

Mr. CARTER.—To waive them,—not to give them up.

Mr. PHELPS.—In 1887.

Sir CHARLES RUSSELL.—I, therefore, have shewn that, in the very next month (the correspondence overlapping the period in which there was the question as to the Convention with a view to Regulations to which Russia was to be a party), there was contemporaneously with it the negotiation going on between the United States and Great Britain alone as to the question of Arbitration upon damages, which necessarily involved questions of right, and there are questions of right expressly mentioned besides. But, further, I have shewn that, after the date I mentioned, the question of the Convention disappears from sight altogether, and that after that the discussion is solely conversant with matters leading up to and ending in the Treaty consummated on the 29th of February, 1892. To suggest that you are to get the means of construing the Treaty of 1892 from negotiations thus pending dealing with different subjects two years before, does I submit lead this Tribunal very far afield indeed; and is the introduction of matter which cannot be considered relevant or pertinent, even if it serve to help the purpose for which my learned friends are using it. Lastly, and it is the concluding document, although I should invite the Tribunal to read all these documents if they have any doubt about it,—lastly, I will read this document of June, 1890; and recollect my learned friend is relying on what took place in 1890. This is what took place in June, 1890.

It is from Sir Julian Pauncefote to Mr. Blaine at page 510 of the volume which you have before you in N° 378. "I did not fail to transmit to the Marquis of Salisbury" he says to Mr. Blaine: "a copy of your note of the 11th instant, in which, with reference to his Lordship's

statement, that British legislation would be necessary to enable Her Majesty's Government to exclude British vessels from any portion of the high seas, 'even for an hour,' you informed me, by desire of the President, that the United States Government would be satisfied if Lord Salisbury would, by public Proclamation, simply request that vessels sailing under the British flag should abstain from entering the Behring Sea during the present season". That leads up to the proclamation to which I have already referred. You will observe that passage is given in inverted commas. "I have now the honour to inform you that I have been instructed by Lord Salisbury to state to you, in reply, that the President's request presents constitutional difficulties, which would preclude Her Majesty's Government from acceding to it, except as part of a general scheme for the settlement of the Behring Sea controversy, and on certain conditions which would justify the assumption by Her Majesty's Government of the grave responsibility involved in the proposal. Those conditions are:—1. That the two Governments agree forthwith to refer to arbitration the question of the legality of the action of the United States Government in seizing or otherwise interfering with British vessels engaged in the Behring Sea, outside of territorial waters, during the years 1886, 1887, and 1889."

Mr. PHELPS.—What is the date?

Sir CHARLES RUSSELL.—The 27th June 1890, two months after the Convention.

Sir RICHARD WEBSTER.—It is page 223 of your Appendix.

Mr. PHELPS.—Yes, I merely wanted the date.

Sir CHARLES RUSSELL.—"2. That, pending the award, all interference with British sealing vessels shall absolutely cease. 3. That the United States Government, if the award should be adverse to them on the question of legal right, will compensate British subjects for the losses which they may sustain by reason of their compliance with the British Proclamation. Such are the three conditions on which it is indispensable, in the view of Her Majesty's Government, that the issue of the proposed Proclamation should be based. As regards the compensation claimed by Her Majesty's Government for the losses and injuries sustained by British subjects by reason of the action of the United States Government against British sealing vessels in the Behring Sea during the years 1886, 1887 and 1889. I have already informed Lord Salisbury of your assurance that the United States Government would not let that claim stand in the way of an amicable adjustment of the controversy, and I trust that the reply which, by direction of Lord Salisbury, I have now the honour to return to the President's enquiry, may facilitate the attainment of that object, for which we have so earnestly laboured". The Tribunal, therefore, sees that in the forefront of these points was the reference to Arbitration of the question of the legality of the action of the United States in seizing or otherwise interfering with British vessels, and next that the United States Government, should compensate British subjects even before any act of seizure was done, if they abstained, in compliance with the request of the United States, from pursuing sealing in the year which is dealt with here.

And, lastly, I must ask you, Sir, to turn over to the next numbering at page 55. It is very clumsily arranged, I am sorry to say.

Sir RICHARD WEBSTER.—It begins on page 37.

Sir CHARLES RUSSELL.—It is a very long despatch of Mr. Blaine of the 17th December, 1890. It begins at page 37, but the passage that I read is on page 55.

I begin at the second break from the top of page 55. — "In his Annual Message, sent to Congress on the 1st of the present month the Presi-

dent, speaking in relation to the Behring Sea question, said—'The offer to submit the question to arbitration, as proposed by Her Majesty's Government, has not been accepted, for the reason that the form of submission proposed is not thought to be calculated to assure a conclusion satisfactory to either party' In the judgment of the President, nothing of importance would be settled by proving that Great Britain conceded no jurisdiction to Russia over the seal fisheries of the Behring Sea. It might as well be proved that Russia conceded no jurisdiction to England over the River Thames. By doing nothing in each case everything is conceded. In neither case is anything asked of the other. 'Concession', as used here, means simply *acquiescence* in the rightfulness of the title, and that is the only form of concession which Russia asked of Great Britain, or which Great Britain gave to Russia. The second offer of Lord Salisbury to arbitrate amounts simply to a submission of the question whether any country has a right to extend its jurisdiction more than one marine league from the shore? No one disputes that as a rule; but the question is whether there may not be exceptions whose enforcement does not interfere with those highways of commerce which the necessities and usage of the world have marked out. Great Britain, when she desired an exception, did not stop to consider or regard the inconvenience to which the commercial world might be subjected", and so on. And then he comes to what I cited.—"It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions which have been under discussion between the two Governments for the last four years.

"I shall endeavour to state what, in the judgment of the President, those issues are". And he propounds the idea of the issues as they appear in the Arbitration in somewhat different forms. One, two, three and four I need not trouble you to read—"What exclusive jurisdiction in the sea now known as the Behring Sea", and so on; "How far were these claims of jurisdiction recognised"; "Was the body of water now known as the Behring Sea included in the phrase 'Pacific Ocean'", and so on; "Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries", and so on; "What are now the rights of the United States as to the fur-seal fisheries", and so on. And then I come to Article VI which you will find is the beginning of Article VII of the Treaty.—"If the determination of the foregoing questions shall leave the subject in such a position that the concurrence of Great Britain is necessary in prescribing Regulations for the killing of the fur-seal in any part of the waters of Behring Sea, then it shall be further determined—

"(1) How far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction:" that is regulations; "Secondly, whether a closed season", (that is also, of course, regulations); "Thirdly, What months or parts of months should be included in such season, and over what waters it should extend". That is also regulations. Now, really, is it necessary that I should go further?

Mr. Justice HARLAN.—There is some difference between that paragraph and Article VII in the Treaty.

Sir CHARLES RUSSELL.—Certainly, but no difference that is the least material on the point we are discussing, which is, whether or not no Arbitration at all was the contingency in the Treaty.

Mr. PHELPS.—Yes.

Sir CHARLES RUSSELL.—I should say that here is the germ of the Treaty, and a fully developed germ of the Treaty, and which, two years before, contemplates the very order and arrangement and terms contained in that Treaty.

Senator MORGAN.—Will you allow me to ask you when it was the words "resorting to Behring's sea" first find their place in this correspondence or in any programme or draft of the Treaty?

Sir CHARLES RUSSELL.—Well, Sir, I will not undertake to say offhand.

Sir RICHARD WEBSTER.—It was in that letter.

Mr. Justice HARLAN.—No, not in that letter, is it?

Sir RICHARD WEBSTER.—Yes, question 5.

Senator MORGAN.—I merely want to know when they got into this Treaty.

The PRESIDENT.—It is a very important topic.

Sir CHARLES RUSSELL.—The words occur, as my learned friend points out in this Article V, but when it first occurs, I cannot say.

Mr. PHELPS.—A reference to two letters between these parties in 1890 will show conclusively all that we undertake to assert on this point, and that is, that if these nations could have got together on the question of regulations, this small matter of compensation would not have stood in the way of a settlement nor given occasion for an Arbitration. On the 28th January, 1890.—I read from the third volume of the Appendix to the Case of Her Majesty's Government, page 399, is a letter from the Marquis of Salisbury to Sir Julian Pauncefote, which is the re-opening of the negotiations which I have referred to that had terminated in 1888.

"I have received your telegram of the 23rd instant, giving the substance of a note you had received from Mr. Blaine, in reply to the proposals made to the Government of the United States for the re-opening of negotiations on the Behring sea question. Her Majesty's Government will be prepared, when the text of the note reaches them, to give it their careful consideration, and to return a formal reply." Then lower down.—"The following are the terms which Her Majesty's Government would be prepared to authorise you to propose to Mr. Blaine. (a) That the tripartite negotiation for securing a close time in Behring's sea for the protection of the fur-seals should be resumed at Washington. (b) That all well-founded claims for compensation on the part of British subjects for seizures in the past of their vessels by authorities of the United States should be dealt with by a separate negotiation as speedily as possible, but that it should be understood that Her Majesty's Government must be satisfied on this point before they can come to any settlement in regard to a close season. (c) Lastly, that an assurance should be obtained from the Government of the United States that there shall be no further seizures", and so on. The answer to that is from Sir Julian Pauncefote to the Marquis of Salisbury by telegraph two days later.—"My Lord, I have the honour to inform your Lordship that I think it is important that I should know the total amount of compensation which is claimed for the seizures of British vessels in Behring's sea up to date before making the proposals indicated in your Lordship's telegram of the 28th instant.

"I have told Mr. Blaine that Her Majesty's Government must have satisfaction on this point before they can agree to any settlement on the other question. Arguing from his stand-point, he denies any right of compensation, but he is willing, for the sake of settling so grave a dispute, to consult the President of the United States as to a gratuitous offer of a lump sum in full satisfaction, in order that discussions on items involving principles on which the views of the two Governments appear irreconcilable may be avoided. He has, therefore, asked me to obtain the above information as soon as possible. If this difficulty be

surmounted, negotiations for a close season might be commenced at once, subject to adequate assurances against further seizures, which, I think, I might be able to obtain."

Therefore while it is true that Great Britain said, Before we will reopen negotiations about regulations we must be satisfied in respect to these seizures, Mr. Blaine replies, while we do not admit your right to compensation we will offer you a lump sum in full satisfaction, if that will enable us to get rid of this objection and there is not a question, if they could have agreed on the other questions, this small matter would have been settled. The United States would have paid the money and made an end of it. As I said, the claims for seizures made in 1886 were a comparatively small sum, as the Tribunal will find when they come to the merits of this case—a comparatively small sum. Mr. Blaine, therefore, well said we would rather pay this small sum than go into this interminable dispute in which we probably can never agree.

The PRESIDENT.—May I ask Mr. Phelps to remind us at what date comes the Agreement the terms of which are embodied in Article IX of the Treaty, the Agreement for a joint commission.

Sir RICHARD WEBSTER.—It was signed on the 18th December 1891, Sir.

Mr. PHELPS.—Yes, signed on that day.

The PRESIDENT.—That is but one year after the correspondence we have been hearing of.

Sir CHARLES RUSSELL.—A year and six months: the correspondence begins in April 1890 and the arrangement is in December 1891.

The PRESIDENT.—The observations made by Sir Charles Russell are in a way opposed—I do not personally quite follow it—and as yet it is my impression only—that they are opposed to your construction of Article IX. They justify it historically. I do not say that they justify it judicially, but simply historically, and your interpretation is in a certain measure justified by the fact that there was a question of Arbitration at the moment when this Agreement took place for a joint Commission. That is what might be urged, I think.

Mr. CARTER.—The question was whether at the time when the first proposals were made for Arbitration by the British Government there were negotiations going on between the Governments for an Arbitration upon the question of right.

Sir CHARLES RUSSELL.—And damages.

Mr. CARTER.—And damages.

The PRESIDENT.—Both parties agree on that?

Mr. CARTER.—Well, do both parties agree? My assertion was, and I read from the letter of April 29th 1890, and its enclosure, the first proposal suggesting any Arbitration between the two Governments was a proposal from Sir Julian Pauncefote; and that suggestion by him, incorporating the framework of a Treaty for the purpose of Arbitration, did not extend to anything but regulations. The question which I understood the learned President to put was whether at that time there were, outside of that letter, negotiations going on between the two Governments, in reference to an Arbitration, having a broader extent than that. The assertion of Sir Charles Russell was that there was at that time, and that is what he undertakes to prove—but allow me to say he has proved nothing of the kind, but proved the contrary—he has produced no letter written prior to that time, but subsequently; and most of those he produced were communications, not between the United States and Great Britain, but between different officers of Great Britain—between Lord Salisbury and Sir Julian Pauncefote –contain-

ing suggestions of what they would propose to the United States, but not that they had been proposed to the United States.

Now, my assertion is that at the time that that scheme was proposed by Sir Julian Pauncefote there was no other suggestion of arbitration pending between the two Governments. I said, at the same time, that after that suggestion was made, not before, or at the time, the Government did go on to discuss the question of Arbitration, and to introduce other questions of right; but it was afterwards, and afterwards only. At the time that that scheme was submitted, on April 29th 1890, there was no other suggested scheme of Arbitration proposed on the part of either Government, and it has not been proved to the contrary. Indeed that statement has been confirmed by letters read by Sir Charles Russell.

Mr. Justice HARLAN.—I want to ask as to a question of fact as bearing on the meaning of the word "contingency" as used in Article IX. I understand the Counsel for the United States to assert that the terms of the agreement for the appointment of Commissioners was, in fact, reached or determined upon by the parties in June 1891.

Sir CHARLES RUSSELL.—Yes.

Mr. Justice HARLAN.—Now I want to know if there is any dispute on that fact. I do not say what it means or does not mean.

Sir CHARLES RUSSELL.—That is the fact.

Mr. Justice HARLAN.—Yes; at that time, though the question of Arbitration was under discussion and had been too for a long while, they were not agreed as to the first six Articles till, say, November 1891, and then on the 18th December 1891, both the terms of the Agreement and the terms of the Arbitration were signed by the parties. Is there any dispute as to those facts?

Sir RICHARD WEBSTER.—The dates are correct; but the first five questions had been agreed to in the early part of 1891, long before the appointment of the Behring Sea Commissioners, April 1891, and previous to the appointment of the Behring Sea Commissioners, the date of their appointment being the 22d June; there had been an arrangement made—a correspondence between Mr. Wharton and Sir Julian Pauncefote that the Commissioners should go out in order to obtain information for the purpose of the Arbitration then agreed to. I can give you the date of the letter if you desire it.

Mr. Justice HARLAN.—If you could put them on a piece of paper, and give them to me I should be obliged.

Sir RICHARD WEBSTER.—I can give them in a moment. Perhaps the most important is the 14th April 1891, Mr. Blaine to Sir Julian Pauncefote, which is a modification of the letter of the 17th of December 1890, read by Sir Charles Russell, stating the first five questions for the Arbitration in the form which they ultimately took in the Agreement of December. Those five questions had been settled for the purposes of Arbitration as early as the 14th April 1891,—that is at page 295 of the first volume to the Case,—the United States Appendix; and in the month of May or June there is the correspondence between Mr. Wharton and Sir Julian Pauncefote, before the Commissioners were appointed, that those Commissioners should go out in order to obtain information which could be used in the Arbitration if necessary.

The PRESIDENT.—The signature of those Articles was only on the 18th December—they get full authority only on the 18th of December.

Sir RICHARD WEBSTER.—The 18th of December, 1891, is the full agreement.

Sir CHARLES RUSSELL.—Might I give this other date, in the large Volume that Mr. Justice Harlan has before him, very near the end of the Volume, at page 161, the letters that have been referred to show the views that had been discussed before the Treaty. This is a letter after the Treaty has been concluded, showing what Mr. Wharton's view was, who was then the Acting Secretary for the United States.

If Mr. Justice Harlan would be good enough to turn to page 162.

General FOSTER.—Will you give us the date of the letter?

Sir CHARLES RUSSELL.—The date of the letter is the 8th of March 1892. "In your note of February 29, you state that Her Majesty's Government has been informed by the British Commissioners that so far as pelagic sealing is concerned, there is no danger of serious diminution of the fur-seal species as a consequence of this year's hunting, and upon this ground Lord Salisbury places his refusal, to renew the *modus* of last year. His Lordship seems to assume a determination of the Arbitration against the United States and in favour of Great Britain, and that it is already only a question of so regulating a common right to take seals as to preserve the species. By what right does he do this? Upon what principle does he assume that if our claims are established", and so on,—it will not be an injury to our property.

Mr. PHELPS.—I beg to remind the Tribunal of another motion that has been filed by the Agent of the United States, to strike out from the Case certain claims for damages and certain evidence. We await, of course, the pleasure of the Tribunal as to the time when it should be heard. The hour for adjournment has nearly come. I wish only to say that at some time, at the convenience of the Tribunal, and before the argument on the merits commences, we desire to have an opportunity to present this motion, so that we may know at the beginning of the argument what claims and what evidence are regarded by the Tribunal as in the Case, and subject to consideration.

Sir RICHARD WEBSTER.—My learned friend the Attorney-General, has asked me to deal with these matters. They are so small that I am perfectly willing they should be discussed at any time the Tribunal think convenient. We did understand the Tribunal to say the other day that—and I read the words—"they consider that this other motion must be reserved to a later stage of the proceedings".

Mr. Justice HARLAN.—I ought to say that I simply understood, and I believe I made the suggestion to the President, that we would take up the argument on the question of the supplemental report first.

Sir RICHARD WEBSTER.—But may I say first with reference to this matter, that I am perfectly willing, as I believe it is a very short matter and will require very little explanation, to take it up now. It can only occupy a very few minutes.

The PRESIDENT.—The Tribunal would rather take the matter up at its next session; and I will ask Mr. Phelps at that moment to bring his motion before us, and we will decide whether we will take it into consideration or not.

The Tribunal proposes to meet privately on Tuesday next, having no public sitting on that day. So our adjournment today will be until Wednesday, at half past 11 o'clock.

The Tribunal accordingly adjourned until Wednesday, April 12, 1893, at half past 11 o'clock.